Supreme Court, U.S.
FILED
JUN 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

86-2032

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. _____

JOHN DE TOMASO,

Petitioner,

v.

PAN AMERICAN WORLD AIRWAYS, INC.

Respondent.

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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139 pp

## QUESTIONS PRESENTED

I. Whether 45 U.S.C. §151 et seq, the Railway Labor Act (hereinafter "RLA") preempts state court remedies by an airline employee against his employer for defamation and intentional infliction of emotional distress where the genesis of the relationship between the parties was the sale by Pan Am to DeTomaso of goods represented by it to be "abandoned", and the conduct complained of arose when Pan Am wrongfully recovered possession of said goods through accusations of theft, threat of arrest, the use of a "friendly" F.B.I. agent and his credentials under color of authority, and the use of self-help, without DeTomaso's consent, all of the foregoing after Pan Am had verified that De Tomaso had purchased the goods from Pan Am and had not stolen them.

II. Whether DeTomaso was denied his right to due process of law under the U. S. Constitution, 14th Amendment, and California Constitution Art. 1, §7, by being denied of

property or personal rights by the California Supreme Court when it used an unidentified document as the basis for its opinion of March 23, 1987, that the conduct of Pan Am complained of by DeTomaso was "inextricably intertwined with the investigation and discharge procedures mandated by the agreement" and that therefore the state court action was preempted under the RLA. In the instant case, neither the collective bargaining agreement nor any of its terms were marked for identification, received into evidence, nor the subject of an agreement, stipulation or acknowledgment by counsel.

III. Whether DeTomaso can be denied his right to trial by jury guaranteed him by the U. S. Constitution, Amendment VII, and by California Constitution Art. I, §16, through application of the doctrine of preemption under the RLA, where the causes of action (defamation and intentional infliction of emotional distress) were, at the time the Constitutional benefits were adopted, mat-

ters at common-law customarily tried by jury or rights at law thereafter adopted and triable by jury.

TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | vi |
| PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA | 1 |
| OPINION BELOW | 2 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT UNDER RULE 28.4(b) | 5 |
| STATEMENT OF THE CASE | 6 |
| REASONS FOR GRANTING THE WRIT | 21 |
| A. The RLA Does Not Serve to Preempt State Court Remedies for Intentional Torts Committed Outside the Purposes of the Act | 21 |
| B. When the California Supreme Court Went Outside the Evidence, Albeit by Error, to Arrive at the Basis of its Opinion, it Deprived DeTomaso of Rights Without Due Process of Law | 27 |

TABLE OF CONTENTS

(Cont.)


PAGE

C. Congress Cannot, by Adopting the RLA, Deny the Constitutional Right of Trial by Jury to a Party in Cases Where, at the Time the Constitution was Adopted, Such Matters Were at Law and For Which Juries Were Used..... 31

CONCLUSION..... 34

APPENDICES:..... A-1

APPENDIX A: OPINION OF THE SUPREME COURT OF THE STATE OF CALIFORNIA, MARCH 23, 1987..... A-1

APPENDIX B: PETITION FOR REHEARING, MARCH 30, 1987..... A-41

APPENDIX C: ORDER OF THE SUPREME COURT OF THE STATE OF CALIFORNIA DENYING THE PETITION FOR REHEARING, APRIL 22, 1987..... A-95

## TABLE OF AUTHORITIES


| CASES: | PAGE |
|---|---|
| Allis-Chalmers v. Lueck (1985) 471 U. S. 202..... | 23, 25 |
| Andrews v. Louisville & Nashville R. R. Co. (1972) 406 U. S. 320..... | 23 |
| Atlas Roofing Co. v. Occup. Safety Comm'n (1977) 430 U. S. 442..... | 33 |
| Crawford v. Southern Pac. Co. (1935) 3 C. 2d 427..... | 20 |
| Interinsurance Exchange v. Savior (1975) 51 CA 3d 691..... | 34 |
| Lady v. Barrett (1941) 43 C. A. 2d 685..... | 27 |
| Loving & Evans v. Blick (1949) 33 C. 2d 603..... | 28, 29 |
| Magnuson v. Burlington Northern, Inc. (9th Cir. 1978) 576 F. 2d 1367..... | 23, 34 |
| Miller v. United Airlines (1985) 174 CA 3d 878..... | 23, 25 |
| Sanders v. Shaw (1917) 244 U. S. 317. | 30 |
| Vandevander v. U. S. (C. A. Miss. 1949) 172 F. 2d 100..... | 32 |
| STATUTES: | |
| California Civil Code §43..... | 4, 33 |
| California Code of Civil Procedure §512.010..... | 22 |

## TABLE OF AUTHORITIES


| STATUTES (Cont.) | PAGE |
|---|---|
| California Code of Civil Procedure § 592..... | 3, 33 |
| California Constitution, Art. 1, §7..... | 3, 30 |
| California Constitution, Art. 1, §16..... | 3, 31 |
| 45 U.S.C. §151a (4) and (5)..... | 4, 21 |
| U. S. Constitution, Amendment VII..... | 2, 31, 33 |
| U. S. Constitution, Amendment XIV..... | 3, 30 |

OTHER AUTHORITIES

| | |
|---|---|
| "Americanization of the Common Law" by William E. Nelson, Harvard Press, 1975..... | 31, 32 |
| "Law in Early American Colonies" by Paul Samuel Reinsch, Ph. D., LL. B., Bulletin #31, University of Wisconsin, October 1899..... | 32 |

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# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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The petitioner John DeTomaso prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California rendered and filed on March 23, 1987.

## OPINION BELOW

The opinion of the Supreme Court of The State of California rendered and filed on March 23, 1987 is, as yet, unreported, but a copy is attached as Appendix A hereto.

## JURISDICTION

The opinion of the Supreme Court of the State of California was rendered and filed on March 23, 1987, and petitioner's Petition for Rehearing (Appendix B) was filed on March 31, 1987. The Order Denying Rehearing (Appendix C) was issued and filed on April 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII, provides as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the

United States, than according to the rules of the common law.

Article 1, §16 of the California Constitution provides, in pertinent part, as follows:

> Trial by jury is an inviolate right and shall be secured to all .... In a civil cause, a jury may be waived by consent of the parties....

California Code of Civil Procedure, §592, provides, in pertinent part, as follows:

> In actions .... for money claimed as due upon contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived....

U. S. Constitution, Amendment XIV, provides, in pertinent part, as follows:

> Section 1. ... nor shall any State deprive any person of life, liberty, or property, without due process of law ....

Article 1, §7 of the California Constitution provides, in pertinent part, as follows:

> Sec. 7(a) A person may not be deprived of life, liberty or property without due process of law ....

California Civil Code §43 provides, in pertinent part, as follows:

> .... every person has the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.

45 U.S.C. §151a (RLA) provides, in pertinent part, as follows:

> The purposes of the chapter are: (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

## STATEMENT UNDER RULE 28.4(b)

Since the proceeding draws into question the constitutionality of the Act of May 20, 1926, c. 347, 44 Stat. 577 as amended, 45 U.S.C. §151 et seq., known as the "Railway Labor Act", and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

## STATEMENT OF THE CASE

DeTomaso has been employed by Pan Am since April 17, 1967. On September 15, 1978, he bought one bin of goods from Pan Am and on September 19, two more bins of goods, all of which Pan Am represented as being abandoned. The sales were sight unseen, and DeTomaso paid $100.00 for each bin. The price was deemed by Pan Am to be fair, and it testified that DeTomaso had the right to rely on the representation of Pan Am that the goods were abandoned and that Pan Am had complied with its own rules governing the disposition of abandoned cargo as well as the laws of California. Pan Am had sold such cargo to the public and Pan Am employees before, and had offered the September 19 bins to another employee before selling them to DeTomaso.

DeTomaso took the boxes home and opened them. The September 15 bin consisted of a surfboard and some Indian "junk" jewelry. The September 19 bins consisted of news-

papers, wearing apparel, aircraft parts, instruments, batteries, and personal effects. The goods comprising the September 19 bins had been lying around the Pan Am warehouse for up to one year and, because of their age, had been collected together, inventoried, placed in the bins and marked "All Transfers. Do Not Touch".

After DeTomaso opened the boxes, he attempted to find purchasers for some of the items that appeared saleable. He sold the instruments to Ryan Aircraft (their true owner) for $169.00 and "photomasks" to the consignee, Texas Instruments (T. I.) for $190.95. While talking with T. I., he asked for the name and telephone number of the T. I. office that buys batteries. He then called to see if T. I. wanted to buy 13,000 GP-57 Silva Cell batteries (used in watches and small computers) which also comprised part of the cargo he bought from Pan Am. He did not know who the consignee of the

batteries was, as there was no invoice in the box. He had no way (nor duty) to determine from the air waybill number who the consignee was because, after 30 days (which had long since passed), Pan Am purges all such information from its computers. De Tomaso gave T. I. his name, work and home telephone numbers. In fact, neither the Ryan Instruments, T. I. "photomasks" or batteries had been abandoned. The batteries had been flown in from Hong Kong to LAX and were to have been trans-shipped via Continental Airlines from LAX to T. I. in Texas. A further error occurred with the batteries in that Continental signed a receipt at LAX acknowledging that it received the cargo. Thus, even if Pan Am computer data had been available, it would have revealed delivery by Pan Am.

T. I. contacted Continental who, on October 16, 1978, called DeTomaso. De Tomaso told Continental he bought the bat-

teries at salvage. Continental then called the F.B.I. Next, F.B.I. agent, Tim O'Neill contacted Pan Am Director of Security, Jim Startzell, and verified DeTomaso's employment and telephone number.

On October 17, 1978, O'Neill and Startzell met with DeTomaso at Pan Am's cargo warehouse at LAX. DeTomaso told them that the batteries were part of the abandoned cargo he bought from Pan Am. Startzell and O'Neill left and spoke to Pan Am Cargo Supervisor Don Roark (the man who sold the goods to DeTomaso). Roark confirmed the sale to DeTomaso. In fact, all of the goods purchased by DeTomaso on September 19 (of which the batteries, "photomasks" and instruments were a part) were on the bin inventory, indicating DeTomaso had not "added" anything to the bins he bought, i. e., had stolen nothing from active bins.

It was at this point in time that the conclusion was reached that there was no

evidence that DeTomaso had stolen anything. The investigation into whether a theft from Pan Am occurred and whether DeTomaso was a thief was concluded. What occurred thereafter had nothing to do with whether an employee of Pan Am (DeTomaso) had stolen cargo from his employer. The next phase of conduct by Pan Am stemmed from its capacity as a seller of goods and its attempt to recover the goods from the person it sold them to (regardless of whether it had the right to do so). What Pan Am did under color of F.B.I. authority, follows.

It should be noted that Startzell had been an F.B.I. agent for 30 years, and a friend of O'Neill for about six years before this time.

Pan Am next commenced a "recovery operation". Startzell and O'Neill returned from their meeting with Roark and asked if DeTomaso would show them the goods

which were at his garage. DeTomaso said he would, so they went to DeTomaso's home and saw the goods on the floor of the garage. DeTomaso's son, Sean, age 11, joined the three men in the garage. Startzell then accused DeTomaso of stealing the goods. Sean asked his father if he was going to be arrested, and DeTomaso asked O'Neill the question. O'Neill replied that he would be arrested if Pan Am found him guilty. De Tomaso did not solicit the accusations. Thereupon, Startzell and O'Neill, over the objections of DeTomaso, confiscated only the batteries but none of the other property that he had been accused of stealing.

Agent O'Neill testified that he had no evidence of a theft, that the F.B.I. does not get involved in civil disputes between third parties, that it does not act as a collection agent for Pan Am, that he did not book the property, as he would

have done if it had been stolen, and that when he went to DeTomaso's garage, he was assisting his friend, Startzell, in his capacity as security agent for Pan Am to recover the property.

Pan Am fired DeTomaso on January 11, 1979 for fraud, dishonesty and abuse of "posted" company policy. But Pan Am had, at no time, posted any policy covering what occurred here, and Pan Am still persisted in accusing him of stealing the goods.

Months before he was fired, as a result of the stress, worry and fear of arrest imposed upon him by Pan Am, DeTomaso suffered severe abdominal pains. He underwent an exploratory laparotomy on November 15, 1978. While inside his abdomen, Dr. Peters removed an inflamed appendix and a small growth on his intestine, neither of which caused the pain nor cured it. It persisted after surgery. Dr. Peters re-

ferred DeTomaso to Dr. Ryan for further tests, but no physical cause of the pain could be found. In addition, DeTomaso's fellow employees shunned him and talked about him. His family, church and social life collapsed. He begged Pan Am for psychological help (but was refused), and he spent in excess of $7,000.00 for medical help.

The instant lawsuit was initiated on December 22, 1978. After being fired on January 11, 1979, DeTomaso filed a grievance, and a Field Board Hearing took place on March 9, 1979, following which he was reinstated with all benefits retroactive to date of discharge and theft charges expunged from his personnel file.

On September 21, 1983, the jury rendered a verdict in favor of DeTomaso for defamation, intentional infliction of emotional distress and breach of implied warranty of title, for $265,000.00, and puni-

tive damages of $300,000/00. Pursuant to the jury instructions given, which were from the Committee on Standard Jury Instructions, Civil, the jury verdict reflected a finding that at the time of the acts complained of, Pan Am knew DeTomaso had stolen nothing, yet had accused him of theft, that the conduct was malicious (intended by Pan Am to cause injury to DeTomaso), and that the defenses asserted by Pan Am were without merit. The verdict rendered was a single verdict and included damages for breach of implied warranty of title, Pan Am not having complied with its policy dealing with the disposition of abandoned cargo, or the laws of California.

Following a Motion for New Trial, the trial judge granted Pan Am's Motion, but denied it if DeTomaso would accept a reduced award of $206,607.00. The judge did not specify the grounds for the remittitur nor the reasons for the grounds (reversable error under California law).

DeTomaso and Pan Am appealed to the California Court of Appeals - DeTomaso on the ground that the trial judge failed to specify the grounds and reasons for the remittitur order, and Pan Am on the ground, amongst others, that DeTomaso's State Court remedies were preempted under the RLA. The Court of Appeal granted DeTomaso's appeal and denied Pan Am's. Pan Am then petitioned the California Supreme Court for review, contending that State Court action was preempted under the RLA because DeTomaso was an employee of Pan Am at the time of the conduct complained of.

The California Supreme Court rendered its Opinion on March 23, 1987 (Appendix A), concluding that DeTomaso's State Court remedies were preempted because the conduct complained of took place during an investigation mandated by the collective bargaining agreement and hence were inextricably intertwined therewith (referring to

the agreement several times and quoting provisions therefrom). Neither the collective bargaining agreement nor any of its terms were ever introduced into evidence, marked for identification, the subject of oral testimony, nor of agreement, acknowledgment or stipulation of counsel. Pan Am did, however, in its Opening Brief on Appeal, cite the Court to an unidentified, partial document, neither complete nor self-identifying, which was attached as an exhibit to its Trial Brief. Neither the partial document nor its text were discussed with the trial judge or counsel before, during or after the trial. The Supreme Court apparently believed the document was in evidence and used it as the basis for its opinion. Thus, the California Supreme Court went outside the evidence in the case.

DeTomaso immediately brought said error to the attention of the Court in his

Petition for Rehearing (Appendix B). The Court denied the petition without comment and without giving DeTomaso the chance to brief this issue (Appendix C). The issue was raised for the first time by the error of the court of last resort in California and can now only be considered by the Supreme Court of the United States.

In addition to going outside the evidence, the California Supreme Court stated as facts matters that were neither in or outside the evidence. Examples may be found in Appendix A, page A-7 (DeTomaso was hospitalized for removal of his appendix.), page A-78 (the boxes containing the batteries were part of recent shipments), A-79 (that the sales to DeTomaso occurred in October 1978). Even Pan Am stated in its Opening Brief that DeTomaso was hospitalized for an exploratory laparotomy because of severe abdominal pains experienced by him following the Startzell and O'Neill

visit to his home. The sale of the goods took place in September, 1978, and not October, and the batteries were in the possession of Pan Am from June 30, 1978 to September 19, 1978 (2-1/2 months, in an industry that delivers goods around the world in but a few days).

Misstatements of the evidence are replete in the Opinion. A graphic example can be found in footnote 13, page A-33, Appendix A. There the Court states:

> "For example, having just discovered the missing batteries in DeTomaso's garage, it is inconceivable that Startzell's accusation was made with knowledge of its falsity or reckless disregard as to whether it was true or false."

The Court apparently forgot that the batteries were the subject of the investigation that brought Startzell and O'Neill to the Pan Am warehouse at LAX in the first place. Neither the F.B.I. nor Startzell knew anything about the other items bought

by DeTomaso until he told them about it while still at the warehouse. DeTomaso told Pan Am where the batteries and other items were located before Startzell and O'Neill went to Roark to verify the sale. After that, Startzell and O'Neill asked DeTomaso if they could go to his garage to see the items. Thus, Startzell didn't "just" discover the batteries on the garage floor for the first time and make a spontaneous declaration accusing DeTomaso of theft. He not only knew where the batteries were, but that DeTomaso had bought the goods. The jury found the conduct of Pan Am to constitute defamation per se, intentional infliction of emotional distress, and that said conduct was malicious so as to justify an award of punitive damages. The California Supreme Court Opinion is based solely on the doctrine of preemption (Appendix A, footnote 2, Page A2-3), and not on whether the evidence supports the verdict. Not even Pan Am in its

appeal to the California Supreme Court raised the issue of insufficiency of the evidence, and by so doing, waived it. The verdict of the jury cannot be altered by the California Supreme Court. The rule of law was correctly stated by said Court in Crawford vs. Southern Pac. Co. (1935) 3 C. 2d 427 at 429:

> "In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (Emphasis added)

These misstatements were brought to the attention of the California Supreme Court in the Petition for Rehearing (Appendix B, pages A-60 to A-85). In denying the Petition for Rehearing, the Court refused to correct the errors called to its attention. They can only be corrected in this proceeding before the United States Supreme Court.

## REASONS FOR GRANTING THE WRIT

### A. The RLA Does Not Serve to Preempt State Court Remedies for Intentional Torts Committed Outside the Purposes of the Act.

The purposes of the RLA are to provide for the settlement of disputes concerning rates of pay, rules or working conditions, grievances, or the interpretation or application of agreements covering rates of pay, rules or working conditions (45 U.S.C. §151a (4) and (5).

In the instant case, the genesis of

the relationship between DeTomaso and Pan Am was vendor/vendee, not employer/employee. The investigation was an F.B.I. investigation into possible theft of goods in interstate commerce. Since DeTomaso was also an employee of Pan Am, it would have an interest in learning if DeTomaso had stolen goods from its warehouse. But, even if, arguendo, Pan Am conducted its investigation concurrently with the F.B.I., that investigation concluded with the finding of no theft prior to Startzell and O'Neill going to DeTomaso's garage on what was admittedly a recovery operation. Not even the true owner, absent DeTomaso's consent, could lawfully use self-help to recover possession of the goods, a fortiori, Pan Am. California Code of Civil Procedure §512.010 requires the filing of a Claim and Delivery action where one person claims title to personal property and contends the other is wrongfully detaining same.

In each case cited by the California Supreme Court as serving as a basis for its opinion, either the interpretation of a labor agreement was at issue, or the act complained of occurred during conduct mandated by a labor agreement which, in turn, was in evidence before the Court. Those cases are Andrews, Magnuson, Miller and Allis-Chalmers, infra.

In Andrews v. Louisville & Nashville R. R. Co. (1972) 406 U. S. 320, the right of the employee to return to work following an injury was dependent upon rights created in the labor contract. DeTomaso's right to return to work was not an issue before the jury, nor was the labor contract.

In Magnuson v. Burlington Northern (9th Cir. 1978) 576 F 2d 1367, the acts complained of involved abuse of the investigatory process and presentation of false evidence at the hearing that led to discharge. The labor contract was before the

Court. The trial court concluded that the contract mandated the investigation and that the acts complained of took place during the investigation.

Unlike Magnuson, DeTomaso did not contend there was an abuse of the investigation process. The investigation established DeTomaso's innocence. Magnuson claimed his damages flowed from his wrongful discharge. DeTomaso claims his damages flowed from torts that occurred months before his discharge. It must be kept in mind that the investigation cleared DeTomaso. Months then went by, and DeTomaso filed this lawsuit. AFTER HE SUED PAN AM, PAN AM FIRED HIM, alleging a theft it had already cleared him of. What does that smell like? Retaliation discharge? Again, DeTomaso sued Pan Am for torts that occurred during the illegal recovery of goods sold him by Pan Am.

The California Supreme Court also cited Miller vs. United Airlines, Inc. (1985) 174 CA 3d 878, in support of its conclusion that the Magnuson test precludes DeTomaso from his state court remedies. (Appendix A, Page A-22, f. n. 9.) Yet, in footnote 9, the Court admits that the torts perpetrated by United against Miller took place during an investigation mandated by the collective bargaining agreement which, in turn, was before the Court. Thus, Miller is not applicable.

In Allis-Chalmers v. Lueck (1985) 471 U. S. 202, when referring to the preemptive effect of §301 of the L.M.R.A., the Court observed that to be given their proper range, one must go beyond suits alleging contract violations, and extend to state claims when an evaluation reveals same to be inextricably intertwined with

with consideration of terms of the labor agreement.

Thus, for either of two reasons, the above cases are not applicable here: (1) the conduct complained of occurred after the investigation of possible employee theft had concluded, and during the recovery of goods that were the subject of the vendor/vendee relationship, having nothing to do with questions involving DeTomaso's employment with Pan Am; and (2) there is no evidence before the Court from which it can be determined if the intentional and malicious torts committed by Pan Am occurred during an act mandated by a labor contract. The RLA does not speak of torts, nor does it require either an investigation as a requi-

site to discharge nor a recovery operation (legal or illegal). The RLA provides no remedy for intentional torts or otherwise that occur during any type of conduct within the purview of its purposes. Surely, Congress did not intend to deprive millions of railway and airline employees of their state court remedies for torts committed against them by their employers, simply because of the employment relationship. Such intent is certainly not found in the legislative history of the RLA or within the Act itself.

B. When the California Supreme Court Went Outside the Evidence, Albeit by Error, to Arrive at the Basis of its Opinion, it Deprived DeTomaso of Rights Without Due Process of Law.

In Lady v. Barrett (1941) 43 C.A. 2d

685, counsel had made statements in his Brief, as proven facts, that were not in evidence in the record. At Page 687, the Court stated:

> "This, of course, is reprehensible practice on the part of counsel, and in our consideration of the appeal, we have disregarded these statements, covering six or seven pages of respondent's brief."

In Loving & Evans v. Blick (1949) 33 C. 2d 603, the trial judge, in passing on a motion to confirm an award, certified that he used affidavits submitted to him at the motion as the evidentiary matters serving as a basis for confirmation. The only "evidence", however, in the record showed that the contract was void because it was based on a failure to comply with licensing requirements. The Supreme Court held that the trial court erred. Where the evidence conflicts with the affidavits, the Supreme Court said that:

> "It is unnecessary here to enter into the realm of conjecture by discussing the effect, if any, of the disputed facts which are set forth in the briefs but which do not appear in the record." (P. 615)

In the instant case, Pan Am wrongfully cited the Supreme Court to an unidentified partial document attached as an exhibit to its Trial Brief. The Supreme court, hopefully by mistake, regarded said document as part of the collective bargaining agreement and used same to conclude that an investigation was mandated by the labor contract as a requisite for discharge and, therefore, the torts of Pan Am were inextricably intertwined with the mandated conduct of the labor contract as to preempt state court action. That document was not "evidence" as is required by Loving v. Blick supra, and should not have been considered. The California Supreme Court refused to rehear the matter and allow the question to be briefed and did thus deny DeTomaso of his

rights without due process of law guaranteed to him by the 14th Amendment to the U. S. Constitution (supra) and Art. 1, §7 of the California Constitution (supra).

The party seeking the benefit of an agreement must prove the existence of the agreement and its terms. Pan Am did neither and such void cannot be filled by conjecture. If appellate courts go outside the evidence in a case, it defeats the very purpose of a trial. Pan Am cannot be allowed to supply an appellate court with non-evidentiary matters simply by having them included in a Clerk's Transcript.

In this case, the use by the California Supreme Court of matter outside the evidence was a surprise to DeTomaso. It had not been done in this case previously. Thus, it gave birth to the federal issue referred to above, and said issue cannot now be resolved except through this petition to the U. S. Supreme Court. Sanders v. Shaw

(1917) 244 U. S. 317.

C. Congress Cannot, by Adopting the RLA, Deny the Constitutional Right of Trial by Jury to a Party in Cases Where, at the Time the Constitution was Adopted, such Matters were at law and for Which Juries Were Used.

Under U. S. Constitution, Amendment VII, and California Constitution, Art. 1, §16, trial by jury is guaranteed. The U.S. Constitution requires that the matter exceed $20.00. The California Constitution allows one to waive a jury. DeTomaso's claim exceeds $7,000.00 in medical specials alone, and he did not waive a jury.

The test seems to be whether at common-law at the time the Constitutions were adopted, such causes of action specified by DeTomaso in his Complaint existed or whether they thereafter were created and accorded jury trials.

In "Americanization of the Common Law" by William E. Nelson, Harvard Press,

1975, it was stated that at common law in the colonies (therein of Mass.) at the time of the Revolution, and as adopted into the common law of the new United States, defamation, negligence and intentional torts resulting in harm or injuries to persons were part of the structured law for which persons could be the subject of civil litigation (Pages 40, 79, 93-95, 195 n. 66). Nelson also said at Page 21 that:

> "The vital fact about the jury system, however, was not that juries tried nearly every case but that they had vast power to find both the law and the facts in those cases."

To the same effect, see also "Law in Early American Colonies" by Paul Samuel Reinsch, Ph. D., LL.B, Bulletin #31, University of Wisconsin, October 1899.

In Vandevander v. U. S. (C.A. Miss. 1949) 172 F. 2d 100, the Court observed that libel, though used to prosecute a seizure for condemnation of land, is a common-law

case in which a jury trial is a right under U. S. Constitution, Amendment VII.

In Atlas Roofing Co. v. Occup. Safety Comm'n (1977) 430 U. S. 442, the Court observed at Page 479 that Congress can create a new right for which a jury trial cannot be had. For jury trial rights, one must look to what the common-law was at the time the Constitution was adopted or to later rights created for which jury trials were allowed.

Under California Code of Civil Procedure §592, in contract actions and actions for injuries, questions of fact must be tried by jury (unless waived). And under California Civil Code §43, every person has the right to be free of harm from personal insult, defamation and injury to his personal relations.. These rights are at law and are accorded jury trials (unless waived).

The common-law right to trial by jury for defamation and intentional infliction of emotional distress existed when the

U. S. Constitution was adopted, as well as when, in 1850 the California Constitution was adopted. Interinsurance Exchange v. Savior (1975) 51 CA 3d 691. Said rights have been codified in California. It is submitted that to deprive Detomaso of his right to trial by jury, would be unconstitutional.

In Magnuson v. Burlington, supra, at 1370, the Court stated:

> "We decline to address any constitutional issue because it was neither raised nor decided below."

DeTomaso has, at every level of appeal, raised the constitutional issue addressed above.

## CONCLUSION

It would be harsh indeed if over 2 million persons employed by the rail and airline industries were deprived of state court remedies for torts committed against them by their employers, solely because of

the employer/employee relationship. There must surely be a line along which a point of division exists, on one side preemption (if constitutional), and on the other side, no preemption. Perhaps, where tortious conduct occurs before a determination of innocence is made, one result would flow whereby the tortious conduct would produce another result if it occurred after innocence was established. In the instant case, the jury found, as a matter of fact, that Pan Am had already determined that DeTomaso was not a thief, but a purchaser of goods; yet, with that knowledge of innocence, it used malicious tortious conduct (defamation per se and intentional infliction of emotional distress), not to mention the unlawful use of "color of authority", to regain that to which it had no lawful right. Pan Am did not rescind the sale, nor even offer to return DeTomaso's money. DeTomaso certainly suffered very substantial injuries as a re-

sult of that conduct. Could Pan Am have murdered DeTomaso, or committed a battery on him, with immunity under the doctrine of preemption? Hopefully not. Yet, what Pan Am did had a far more lasting effect on DeTomaso than he would have experienced had he been hit on the nose or accused of murder (which could easily have been refuted). The accusation of theft in the presence of his 11 year old son, the threat of arrest, the effect of the allegation in his workplace, had a far more telling effect than a battery.

For the reasons specified in the main text of this Petition, DeTomaso prays that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

| | |
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| JOHN DeTOMASO, Plaintiff and Appellant, v. PAN AMERICAN WORLD AIRWAYS, INC., Defendant and Appellant. | L.A. 32150 (Ct. of Appeal No. 2/3 BOO6675) (Sup. Ct. No. SWC 48784) 23 MARCH 1987 |

In this action for breach of warranty of title, defamation, and intentional infliction of emotional distress, Pan American World Airways, Inc. (Pan Am) seeks review of the Court of Appeal's decision (1) setting aside an order conditionally granting Pan Am's motion for new trial on the issue of damages, (2) affirming and reinstating the judgment on the verdict, and (3) holding that employee John DeTomaso's tort claims were not preempted by the Railway Labor Act (45 U.S.C. § 151 et seq., hereafter sometimes referred to as RLA or Act).

We granted review in order to resolve a conflict among the Courts of Appeal as to when state tort claims are preempted by the RLA.[1/] As explained hereafter, we conclude that on the facts presented in this case the intentional infliction of emotional distress and defamation claims are preempted.[2/]

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[1/] The RLA preemption issue was first raised in Pan Am's trial brief. DeTomaso claims that, since the issue was not specifically pleaded as an affirmative defense, it was waived. Whether or not tort claims are preempted by the RLA is a question of subject matter jurisdiction (Beers v. Southern Pacific Transp. Co. (9th Cir. 1983) 703 F.2d 425, 429), which cannot be waived. (Summers v. Superior Court (1959) 53 Cal.2d 295, 298.)

[2/] Although other issues were raised in the parties' briefs, we ordered that "pursuant to rule 29.2(b) of the California Rules of Court, oral argument . . . will be limited to the issue of whether an employee's claims for intentional infliction of emotional distress and defamation are preempted by the Railway Labor Act (45 U.S.C. § 151 et seq.) when those claims arose out of the employer's investigation into conduct by the employee that might be grounds for discharge."

The parties have questioned whether our reference to "oral argument" meant that they were still free to submit briefs on the other issues. The answer is given in the of rule 29.2(b) which, after referring to the court's ability to specify "the issues to be

## FACTS

DeTomaso worked in Pan Am's Los Angeles cargo department. On September 15, 1978, he purchased a bin of abandoned cargo from Pan Am for $100.[3/] He made the purchase through Don Roark, a supervisor in the cargo department. Four days later, he paid $200 for two more bins of what he and Roark believed to be abandoned cargo.

Before DeTomaso's purchases, William Lasso, a cargo department employee, had prepared an inventory of shipments that had been in the warehouse for an unusually long time. Lasso placed the inventoried shipments in bins, with a sign stating, "All transfers.

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(fn. 2, cont.) argued," states: "Unless otherwise ordered, briefs on the merits and oral argument shall be confined to the specified issues and issues fairly included in them."

In this case, we intended by our order to limit oral argument and briefing to the issue specified -- preemption.

3/ The parties stipulated at trial that there was no restriction on employee purchases of abandoned cargo.

Do not touch." Transfers were items to be transferred to other carriers who would transport them to cities not served by Pan Am.

One of the inventory items found in DeTomaso's bins was a shipment of 13,000 Sylva Cell batteries. Shortly after his purchase, in an effort to sell these batteries, DeTomaso contacted a Texas Instruments representative in Lubbock, Texas. The representative informed him that similar batteries had been noted as a delinquent shipment. DeTomaso told the representative that he had purchased the batteries in salvage and that he would be willing to sell them to Texas Instruments if the company was interested in repurchasing them. DeTomaso testified that before the phone call he was unaware that the batteries were originally to be shipped to Texas Instruments. The batteries were, however, on record as having been transferred by Pan Am to Continental Airlines (Continental). Continental had received a

claim of loss for the batteries from Texas Instruments.

DeTomaso did not hear from the Texas Instruments representative again. Instead, on October 16, 1978, he received a call from Continental. The caller asked DeTomaso where and how he had obtained the batteries. De Tomaso replied that he had purchased them from salvage and would have the seller contact Continental. DeTomaso did not, however, testify he told anyone at Pan Am about this call.

Continental contacted the Federal Bureau of Investigation (F.B.I.) at the Los Angeles International Airport. The F.B.I., in turn, contacted Pan Am's director of security, Jim Startzell. Startzell and F.B.I. Agent Tim O'Neill interviewed DeTomaso on October 17, 1978. During the interview, DeTomaso told Startzell and O'Neill that all the cargo he had purchased was stored in his garage. He offered to show it to them.

Once inside the garage, Startzell conduc-

ted an inventory of the cartons that had identifiable air waybill numbers.[4/] Some, including seven cartons containing the batteries, appeared to be part of recent shipments. O'Neill confiscated the batteries and delivered them to Continental.

DeTomaso's 10-year-old son, Sean, was present in the garage during the investigation. Startzell said something to DeTomaso that Sean interpreted as an accusation of theft.[5/] Both Sean and DeTomaso's wife, Carla, testified that after the investigation the family relationship deteriorated.

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[4/] Air waybill numbers are small adhesive labels placed on cargo cartons for identification.

[5/] It is unclear exactly what statements Sean interpreted as an accusation. Startzell testified that DeTomaso asked if he was in trouble. Startzell replied, "'I don't know if you're in trouble, but somebody's in trouble because this Texas Instruments shipment should not have been here.'" DeTomaso testified that Startzell stated that it appeared that he had stolen the batteries and that, since there were air waybill numbers on the cartons, he had probably taken them. Sean testified simply that Startzell had "accused his father of stealing."

In November 1978, DeTomaso began experiencing physical pain. He ultimately was hospitalized for the removal of his appendix and of a growth on his intestine. At trial a psychiatrist whom DeTomaso had consulted in 1980, some two years after the operation, opined that DeTomaso's physical pain and appendicitis were caused by Pan Am's conduct, as was his continued depression and physical discomfort.

All employees of the cargo department in Los Angeles are represented by the Teamster's Union, Local 2707. As required by the RLA (45 U.S.C. § 152 First), the union and airline were parties to a collective bargaining agreement (the agreement). The agreement provided that no employee could be disciplined or discharged without "investigation by a recognized official of the (airline)." In the event an employee was to be disciplined or discharged, specified procedures were to be followed. Further, an employee who believed "that he (had) been

njustly dealt with" or that any provision f the agreement "(had) not been properly pplied or interpreted" could present a rievance.

Pan Am suspected that DeTomaso had btained by questionable means, not only the attery shipment, but possibly other items hich were found in his garage. As a result, s required by the agreement, Pan Am investiated further into the October salvage purhases in order to determine whether to ischarge or otherwise discipline DeTomaso. wice during the investigation Pan Am offiials contacted the local union representative, aroop Chandiramani, to inform him that the ompany was considering discharging DeTomaso or theft.

Although the terms of the agreement did ot expressly require such calls when an nvestigation of an employee represented by he union was underway, an informal agreeent did. According to Chandiramani, such alls -- known as "courtesy calls" -- were

a customary part of the pretermination procedures established between the airline and union. If such calls were not made, the union "would have a legitimate disagreement" with Pan Am.

Sometime early in January 1979, a meeting was held at which DeTomaso, Chandiramani, Startzell and other Pan Am officials were present. The meeting, like the calls, was an informal but customary part of established pretermination procedures.

In the course of the meeting, Startzell stated that DeTomaso was being discharged because of his involvement in the theft of the batteries. Chandiramani noted the harsh implications of that statement. Startzell explained that he did not necessarily mean that DeTomaso was a thief, but that the circumstances pointed to a theft somewhere in the chain of events that led to the presence of the batteries in DeTomaso's garage.

By letter of January 11, 1979, DeTomaso

was notified that he had been discharged, as of that day, for "fraud, dishonesty and abuse of company policy." The same day, DeTomaso filed a grievance claiming his termination by Pan Am violated the agreement. The grievance form also designated his union local to act on his behalf "in the disposition and settling of this grievance." The grievance form was signed by DeTomaso and Chandiramani as the union business agent. Following a grievance hearing, the grievance was denied on the ground that DeTomaso's actions were in violation of Pan Am's employee rules of conduct.

Pursuant to the provisions of the agreement, DeTomaso appealed to the Western Regional Field Board of Adjustment on March 9, 1979. At that hearing a settlement was reached. In exchange for withdrawal of the grievance, DeTomaso would be reinstated and made whole. Accordingly, Pan Am removed the termination letter from DeTomaso's file, retroactively restored his seniority and

benefits, and reinstated him to the payroll with backpay.

On December 22, 1978, prior to his discharge, DeTomaso had filed a civil complaint seeking damages for Pan Am's alleged breach of warranty of title to the battery shipment. On February 15, 1979, after his discharge but before settlement of the grievance, he filed a first amended complaint, which added causes of action for defamation and for negligent and intentional infliction of emotional distress. On June 8, 1979, DeTomaso filed a second amended complaint deleting the causes of action for negligent infliction of emotional distress and for damages related to lost wages and employment benefits resulting from his discharge. Even so, the allegation giving rise to the intentional infliction of emotional distress cause of action was that "defendants wrongfully fired plaintiff from his job and falsely accused plaintiff of fraud, dishonesty and abuse of company policy as the basis for his

discharge." The causes of action in the second amended complaint were tried before a jury in September 1983.

By the close of the evidence at trial, the court determined that the defamation cause of action could not stand as pleaded. However, plaintiff was allowed to amend his pleading to charge that Startzell's statements in the garage, overheard by DeTomaso's son, constituted defamation. Those statements were not alleged to constitute intentional infliction of emotional distress.

A divided jury awarded DeTomaso a lump sum of $265,000 general damages and $300,000 punitive damages. Since a general verdict was returned, no allocation of damages was made to either the tort or warranty causes of action, nor did the verdict indicate which cause of action formed the basis of liability.

Pan Am moved for judgment notwithstanding the verdict or, in the alternative, for new trial or remittitur. At the hearing on the motions, the court stated that it was "amazed

at the amount of damages . . . awarded in this trial . . . (and could) only conclude that this verdict by this jury was given under passion and prejudice. It's a very excessive verdict under the evidence." The court, without a statement of reasons, granted the motion for new trial on the limited issue of damages, subject to the condition that if DeTomaso would agree to accept a remittitur by a reduction of $358,393 the motion would be denied.

DeTomaso refused to accept the remittitur. Instead, he appealed on the ground that the order failed to comply with section 657 of the Code of Civil Procedure.[6/]

Pan Am conceded the deficiency of the order, but cross-appealed, arguing, inter alia, that the RLA preempted DeTomaso's tort

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[6/] Section 657 provides, in pertinent part: "When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground."

claims. The Court of Appeal rejected Pan Am's argument and reinstated the judgment due to the trial court's failure to comply with Code of Civil Procedure section 657. We now review the propriety of the Court of Appeal's conclusion that DeTomaso's tort claims were not preempted.

## DISCUSSION

### I. History and Background.

The RLA was passed in 1926, in the wake of the Railway Shopmen's Strike. (1 Morris, The Developing Labor Law (2d ed. 1983) p. 20.) "The Railway Labor Act was not (so much) an expression of social concern or an attempt to assist a disfavored combatant in the industrial relations struggle (as) a legislative attempt to stabilize industrial relations patterns and extend periods during which the parties themselves could work out a peaceful solution to their disputes." (18H Kheel, Labor Law (1986) § 50.02, p. 50-4 (hereafter Kheel).)

A primary purpose of the Act is "to

provide for the prompt and orderly settlement of all disputes growing out of "grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." (45 U.S.C. § 151a(5).) Such disputes are known as "minor disputes."[7/] (Frandsen v. Broth, of Ry., Airline & S.S. Clerks (7th Cir. 1986) 782 F2d. 674, 685; Kaschak v. Consolidated Rail Corp. (6th Cir. 1983) 707 F.2d 902, 904; 18H Kheel, supra, § 50.05 (1) at p. 50-23; 1 Morris, supra, at p. 20.)

Initially, the Act merely encouraged carriers and their employees to enter into arbitration agreements for resolution of minor disputes. (Act of May 20, 1926, Pub. L. 69-257, § 5, 44 Stat. 577.) "Because of its completely voluntary nature, however, this scheme resulted in difficulties and

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7/ "Major disputes" involve the negotiation of collective bargaining agreements. (18H Kheel, supra, § 50.05(1), at p. 50-23.)

labor unrest." (18E Kheel, supra, § 26.02(2), at p. 26-24.) Consequently, in 1934 the Act was amended to establish the National Railroad Adjustment Board and to require carriers to participate in the administrative procedures established by the Act for the resolution of minor disputes. (Act of June 21, 1934, Pub.L. 73-442, § 3, 48 Stat. 1185; Union Pacific R. Co. v. Price (1959) 360 U.S. 601, 612; 18E Kheel, supra, at p. 26-24.)

In 1936 the Act was extended to encompass the airline industry. (45 U.S.C. § 181 et seq.) Although no permanent national board of adjustment has been established for the airline industry, individual carriers and their employees are under a statutory duty to establish "system, group or regional boards of adjustment" for resolution of minor disputes. (45 U.S.C. § 184; see also Machinists v. Central Airlines (1963) 372 U.S. 682, 686.) The Regional Field Board of Adjustment is such an entity.

The RLA directs that minor disputes

be settled "on the property in the usual manner, but failing adjustment either party (can) take the matter to the adjustment board (created) to hear and decide it." (Machinists v. Central Airlines, supra, 372 U.S. at p. 689; 45 U.S.C. §§ 153 First (i), 184).

Under the RLA the role of courts in the area of minor disputes is extremely limited. Generally, courts will intervene only to determine the validity of an underlying contract (see e.g., Machinists v. Central Airlines, supra, 372 U.S. 682), to enforce a board of adjustment award (see e.g. Brotherhood of R.R. Trainmen v. Denver and Rio Grande Western R.R. Co. (10th Cir. 1966) 370 F.2d 833, 836, or to provide the limited review permitted by the Act.[8/]

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[8/] Under the RLA, a court reviewing the decision of a board of adjustment may set aside the decision only for "failure of the (board) to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the (board)'s jurisdiction, or for fraud or corruption by a member of the (board) making the order." (45 U.S.C. §§ 153 First (p).)

Congress considered it essential to keep so-called minor disputes within the boards of adjustment and out of the courts because finality of administrative determinations is essential to the boards in fulfilling their task of promoting stability in the air and rail carrier industries. (Union Pacific R. Co. v. Sheehan, supra, 439 U.S. 89, 94; see also Gunther v. San Diego & A.E.R. Co. (1965) 382 U.S. 257, 263; Evans v. Missouri Pacific R. Co. (E.D. Mo. 1985) 618 F.Supp. 930, 931-932.) When the RLA mandates that a claim be resolved by resort to arbitration and grievance procedures, those procedures are the exclusive remedy available to the claimant. (Andrews v. Louisville & Nashville Railroad Company (1972) 406 U.S. 320, 325.)

Thus, the question we must answer here is whether the acts alleged in DeTomaso's tort causes of action are inextricably intertwined with the provisions of the collective bargaining agreement, so as to be governed by the grievance and arbitration procedures

set forth therein. For the reasons hereinafter stated, we conclude they are.

II. Characterization of Claims.

"(T)he line between a tort actionable in court and an employment dispute actionable only in a grievance arbitration proceeding is . . . not sharp except in extreme cases." (Lancaster v. Norfolk & Western Ry. Co. (7th Cir. 1985) 773 F.2d 807, 814.)

The starting point of preemption analysis is the United States Supreme Court's decision in Andrews v. Louisville & Nashville R.R. Co., supra, 406 U.S. 320. There, plaintiff brought an action for wrongful discharge against his employer when the employer refused to allow him to return to work after he recovered from an injury. The court held that the only source of plaintiff's right not to be discharged was the collective bargaining agreement. (Id. at p. 324). Accordingly, the existence and extent of any obligation to restore the employee to his regular duties after recovery from the injuries would depend

on an interpretation of that agreement. As such, the claim was subject to the Act's arbitration requirement. (Ibid.) "The fact that (the plaintiff) characterize(d) his claim as one for 'wrongful discharge'" made no difference. (Id. at pp. 323-324.) This was true even though the plaintiff sought damages rather than reinstatement.

Andrews teaches that one must look to the substance of the claim, not its characterization, to determine whether an action is preempted. This is so even where the alleged tort is for other than wrongful discharge. A leading case on point is Magnuson v. Burlington Northern, Inc. (9th Cir. 1978) 576 F.2d 1367. In that case the employee, a train dispatcher, was on duty when a fatal accident occurred. The employer conducted an investigation and hearing, as required by the collective bargaining agreement. The employee was found responsible for the accident and was discharged. He then filed an action seeking damages for

intentional infliction of emotional distress based on the railroad's alleged conspiracy to cover up the negligence of its supervisory employees by making him the scapegoat.

The Magnuson court held that, in determining whether or not a purported tort claim is in substance a minor dispute, courts should look to whether or not the conduct complained of is "'arguably' governed by the collective bargaining agreement or has a 'not obviously insubstantial' relationship to the labor contract." (Magnuson, supra, 576 F. 2d at pp. 1369-1370.) In either case, such a complaint involves a minor dispute which must be arbitrated under the RLA. (Id. at p. 1369).

Applying the foregoing tests, the Magnuson court determined that Magnuson's action for emotional distress was barred. All of Magnuson's claimed damages flowed from his wrongful dismissal from employment. The employer's allegedly tortious acts involved abuse of the investigatory process

and presentation of false evidence at the hearing that led to Magnuson's discharge. Both the investigation and hearing were required by the collective bargaining agreement as a prerequisite to discipline. Thus, Magnuson's action was based on a "matrix of facts" which was "inextricably intertwined" with the grievance machinery of the collective bargaining agreement and the RLA. (576 F.2d at p. 1369.)[9/]

The Magnuson rule -- that an action is preempted if the conduct underlying it is

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9/ At least one court in this state has adopted the Magnuson test. In Miller v. United Airlines, Inc. (1985) 174 Cal.App. 3d 878, an airline stewardess filed an action against the airline for, inter alia, intentional infliction of emotional distress, defamation, and invasion of privacy. The conduct complained of -- allegedly falsified work critiques and verbal harassment -- took place during an investigation conducted by the airline pursuant to the collective bargaining agreement. The court correctly held that the causes of action were inextricably tied to the agreement, and thus were minor disputes properly resolved by arbitration, and were preempted by the RLA from judicial adjudication. (Id. at p. 889.)

"arguably governed by" or has a "not obviously insubstantial relationship to" the collective bargaining agreement -- has been followed in numerous federal and state courts in a variety of contexts. (See, e.g., Stephens v. Norfolk & Western Ry. Co. (6th Cir. 1986) 792 F.2d 576, 580 (civil rights of the handicapped); Jackson v. Consolidated Rail Corp. (7th Cir. 1983) 717 F. 2d 1045, 1053 (Federal Employer's Liability Act); Beers v. Southern Pacific Transp. Co. (9th Cir. 1983) 703 F.2d 425, 428-429 (intentional infliction of emotional distress); Schroeder v. Trans World Airlines, Inc. (9th Cir. 1983) 702 F.2d 189, 192 (wrongful termination); Gray v. Chessie System (D.Md. 1984) 588 F.Supp. 1334, 1337 (intentional interference with contractual relations); Schwadron v. Trans World Airlines (W.D. Pa. 1984) 585 F.Supp. 1371, 1373-1374 (negligent misrepresentation); Spencer v. Missouri Pacific R.R. (E.D. Mo. 1984) 581 F.Supp. 1220, 1221 (conspiracy to interfere with employment

rights); Major v. United States (D.Md. 1981) 525 F.Supp. 853, 857 (defamation, false imprisonment); Carson v. Southern Ry. Co. (D. S.C. 1979) 494 F.Supp. 1104, 1112 (defamation); Downing v. The Travelers Ins. Co. (Idaho 1984) 691 P.2d 375, 381 (entitlement to death benefits); Burkin v. Burlington Northern R.R. Co. (Mo. App. 1985) 690 S.W.2d 508 (emotional distress, wrongful discharge); Gonzalez v. Northwest Airlines, Inc. (N.J. Super. App. Div. 1985) 493 A.2d 547, 550 (wrongful discharge).)

The Magnuson rule is consistent with the United States Supreme Court's recent decision in Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202 concerning the effect of section 301 of the Labor Management Relations Act (LMRA) (29 U.S.C. § 185(a)). The court there stated, "If the policies that animate § 301 are to be given their proper range . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations." (Id. at p. 210). It must also extend to

state claims, the evaluation of which is inextricably intertwined with a consideration of the terms of the collective bargaining agreement. (Id. at p. 211.)

Like the United States Supreme Court, we believe that, if the policies underlying the RLA are to be given their proper force, the preemptive effect of that Act cannot be limited to suits alleging contract violations.[10/] If an employee can institute a civil action, in essence litigating the questions at issue in an arbitration, the value of arbitration as a dispute resolution tool will be undermined. Further, if the courts can be used as forums to resolve arbitrable disputes, employees can make an end run thereby avoiding the carefully crafted congressional procedures set forth

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10/ Indeed, arguably the case for insisting on resort to arbitration and grievance procedures is stronger in cases arising under the RLA than it is in cases arising under section 301 of the LMRA. (Andrews, supra, 406 U.S. at p. 323. But see Lancaster v. Norfolk & Western Ry. Co. (7th Cir. 1985) 773 F.2d 807.)

in the RLA. These results cannot be squared with federal policy.

We conclude, therefore, that the Magnuson approach is the correct one. RLA preemption must, as the Magnuson court stated, extend to any claim premised on facts inextricably intertwined with matters subject to the grievance procedures of the collective bargaining agreement. To adjudicate such issues would necessarily involve interpretation of the agreement, which a court is without jurisdiction to do. Mere theoretical legal independence is not enough to save a purported tort cause of action from preemption under the RLA. Instead, it must appear from the plaintiff's complaint that the facts on which the cause of action is premised either: (1) are unrelated to matters expressly or impliedly governed by the collective bargaining agreement; or (2) so far exceed the scope of reasonable conduct in the context of such matters that reference to the collective bargaining agreement is unnecessary to

resolve the claim.[11/]

Here, in rejecting Pan Am's preemption contention the Court of Appeal relied heavily on Raybourn v. Burlington Northern Ry. Co. (W.D. Mo. 1985) 602 F.Supp. 385. In Raybourn, when an employee sleeping on duty was awakened, he showed marked signs of drunkenness and admitted having consumed a

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11/ For example, some courts have concluded that Federal Employers' Liability Act (FELA) 45 U.S.C. §§ 51-60) claims premised on physical injury are not preempted. (See, e.g., Lancaster v. Norfolk & Western, supra, 773 F.2d 807; Buell v. Atchison, Topeka and Santa Fe Ry. Co. (9th Cir. 1985) 771 F.2d 1320, cert. granted (1986) ___U.S.____(106 S.Ct. 1946).) At least one case has held that state tort causes of action premised on an employer's attempt to prevent his employee from retaining counsel to process a FELA claim were sufficiently independent from the collective bargaining agreement so as not to be preempted by the RLA, as nothing in the agreement remotely related to whether or not one could retain counsel to pursue FELA claims. (See Balzeit v. Southern Pacific Transp. Co. (N.D. Cal. 1983) 569 F.Supp. 986, 990.) Similarly, another case has held that state court jurisdiction over claims by former employees for alleged intentional infliction of emotional distress was not preempted by either the RLA or the FELA, when the distress was based on a continual and egregious pattern of harassment by the employer. (Pikp v. Burlington Northern R. Co. (Minn. 1986) 390 N.W.2d 743.)

half pint of liquor late the previous night. Pursuant to company policy, the employer's agents took him to a hospital for a blood alcohol test. When he refused to be tested, the agents called the police and requested that they escort the employee home. A heated argument broke out between the employee and the agents, whereupon the police arrested the employee for disorderly conduct. The employee was subsequently discharged. After unsuccessfully seeking reinstatement via the grievance procedures established in the collective bargaining agreement, the employee filed suit against his employer, alleging false arrest and imprisonment and wrongful institution of arrest.

The Raybourn court rejected the employer's RLA preemption argument on grounds the claim was "legally independent of any contractual claims or grievances he may have." (602 F.Supp. at p. 387.) In so doing, the court failed to follow the dictates of Andrews, supra, 406 U.S. 320, and Magnuson, supra,

576 F.2d 1367, and did not analyze the substance of the claim, rather than its terminology, to determine whether it was in fact premised on the collective bargaining agreement or inextricably intertwined with its grievance machinery. Instead, the court simply stated, in a conclusory fashion, that since the employee's claim was a "typical tort claim," it was not preempted. The weight of authority follows Magnuson and is contrary to Raybourn. We believe the Magnuson rule is more persuasive and should be followed.

The facts in the case at bench fall squarely within the ambit of Magnuson. Here, as previously noted, the collective bargaining agreement required that an investigation and hearing take place before an employee could be discharged or disciplined. When Pan Am learned of what appeared to be a theft in which DeTomaso may have been implicated, it conducted the required investigation and held a hearing before determining

whether to discharge or discipline him. DeTomaso complains of the statements made during both the investigation at his garage and the subsequent courtesy calls to Chandiramani, and of Startzell's statement at the January 1979 meeting. However, all these acts were inextricably intertwined with the investigation and discharge procedures mandated by the agreement. Indeed, all of the alleged wrongful conduct took place during the ordinary course of these proceedings.

In our view, the investigator's statements in the garage cannot form the basis for liability. The conduct complained of took place during the course of, and as part of, an investigation mandated by the collective bargaining agreement. The parties to such an agreement must be allowed to perform their duties without judicial interference in all but the most outrageous of cases. We do not find that the acts complained of establish such an outrageous case. Additionally, the conduct of the investigation was itself

subject to the collective bargaining agreement's grievance adjustment procedure, since it was, in the language of the contract, a provision of that agreement which DeTomaso evidently believed had "not been properly applied." Thus, the abuses alleged by De Tomaso were remediable, if at all, only through the grievance and arbitration provisions of the collective bargaining agreement. For the jury or a court to second guess whether the required investigation was "reasonable" under the circumstances here would undermine the exclusiveness of those procedures. (See Magnuson, supra, 576 F.2d at p. 1369; Seid v. Pacific Bell (S.D. Cal. 1985) 121 LRRM 2346, 2353.) This we cannot do.[12/]

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12/ DeTomaso argues that since the genesis of the controversy was the purchase and sale of the salvage bins, his tort claims stem not from the employment relationship, but from the vendor-vendee relationship. Such a characterization is entirely implausible in light of the fact that none of the alleged misconduct occurred in the course of the sale or was related to it in more than an extremely tangential sense. Instead, the

Similarly, statements made to the union representative or during formal or informal disciplinary hearings cannot support a cause of action. There can be no doubt that the statements made by Pan Am to the union representative in the context of a disciplinary investigation are privileged and cannot form the basis for liability at law, whether or not they were made during an actual grievance proceeding. (See Hasten v. Phillips Petroleum Co. (10th Cir. 1981) 640 F.2d 274, 278; General Motors Corp. v. Wendicki (10th Cir. 1966) 367 F.2d 66, 71.) Moreover, as previously discussed, the reasonableness of the investigation and hearings was a question subject to the agreement's grievance and arbitration provisions. De Tomaso's remedy was in the forum provided for in the agreement.

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(fn. 12, cont.) conduct complained of occurred in the course of a legitimate investigation of what reasonably appeared to Pan Am to have been a cargo theft in which DeTomaso might have taken part.

EDITOR'S NOTE:

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We are not persuaded that the allegation of defamation, whether it concerns Startzell's statement in the garage or statements made during the formal or informal disciplinary procedures, brings Pan Am's conduct into the realm of actions that so far exceed the scope of reasonable conduct that reference to the agreement is unnecessary.[13/] Under the

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13/ In addition, even if DeTomaso could allege an action for defamation, it is likely that he would have to prove "actual malice" as defined in New York Times v. Sullivan (1964) 376 U.S. 254. (Farmer v. United Brotherhood of Carpenters & Joiners, Local 25 (1977) 430 U.S. 290, 298-299; Linn v. United Plant Guard Workers (1966) 383 U.S. 53, 65-66.) The New York Times standard applies to assure that the robust speech often occurring in the labor context does not become the basis for judicially imposed liability. The jury in the instant case was not so instructed. We note in passing that the facts alleged here cannot possibly meet that standard. For example, having just discovered the missing batteries in DeTomaso's garage, it is inconceivable that Startzell's accusation was made with knowledge of its falsity or reckless disregard as to whether it was true or false.

agreement, Pan Am could not impose discipline without cause. It was therefore necessary for the employer to prove some act by DeTomaso establishing that cause; specifically, Pan Am had to prove that DeTomaso wrongfully obtained the batteries. Yet that allegation was the substance of the comments DeTomaso alleges to be defamatory. As truth is a defense to defamation, the question of whether DeTomaso stole the property in question would be at issue in the tort case as well as in the arbitration. In the context of the employer's investigation, the very allegations that form the basis of the inquiry, which may lead to disciplinary action, cannot be the predicate for the outrageous conduct on which the state tort action is based. (Farmer v. United Brotherhood of Carpenters & Joiners, Local 25 (1977) 430 U.S. 290, 305.) The situation would, of course, be different if Pan Am's agents had physically assaulted DeTomaso or accused him of murder rather than theft.

DeTomaso unsuccessfully attempts to escape the effect of Andrews, supra, 406 U.S. 320, and Magnuson, supra, 576 F2d 1367, by relying on Farmer v. United Brotherhood of Carpenters & Joiners, Local 25 (1977) 430 U.S. 290, decided under the National Labor Relations Act (NLRA). In Farmer, union officials subjected plaintiff, a member of the union, to a campaign of personal harassment including frequent public ridicule and incessant public abuse and intentionally engaged in outrageous conduct, threats, and intimidation. The United States Supreme Court held that Farmer's court action was not preempted by the NLRA, even though the union's conduct could arguably be characterized as an unfair labor practice. The court determined that there was little danger that judicially imposed liability for the alleged union misconduct would interfere with federal labor policy. Indeed, the acts complained of were only of "peripheral concern" to any federal labor interest. In contrast, the

state was found to have a great interest in proscribing the alleged conduct. The court also noted that plaintiff's claim did not involve an arbitrable grievance under a collective bargaining agreement, and so preemption under section 301 of the LMRA was not at issue. (Id. at p. 303, fn. 12.)

Because the case at bench does concern a collective bargaining agreement, Farmer does not control here. Where an employee through a collective bargaining agreement has an alternative to litigation, an additional important federal policy is implicated, specifically that of enforcing labor arbitration agreements under the LMRA or the RLA. If such an avenue is available, it will usually constitute the only avenue of redress. DeTomaso had such an avenue available and in fact used it to regain his employment from Pan Am. Pan Am's investigation was mandated, and so governed, by the collective bargaining agreement. Thus, he could have and should have sought relief

through the grievance procedure.

Even aside from the strong federal interest in enforcing arbitration provisions in employment contracts, Farmer does not apply to the case at bench. Farmer held that state court actions could be adjudicated only where resolution of the case could be had without resolving the "merits" of the underlying labor dispute. (Id. at p. 304.) Here, the question of how in fact DeTomaso came into possession of the property, i.e., whether a theft occurred, is the principal issue that was to be adjudicated by the adjustment board. If there was no wrongful conduct, there could be no basis for termination under the agreement.

In addition, the factual setting in Farmer is readily distinguishable from the case at bench. Certainly California has an interest in punishing defamatory statements and intentional inflictions of emotional distress, as it has in proscribing all tortious conduct. However, the acts

alleged by DeTomaso do not rise to the level of those alleged in Farmer. In stark contrast to the extreme misconduct by the union officials alleged there, Pan Am's agent is alleged to have accused DeTomaso of theft during a mandated investigation concerning theft. As we have already noted, statements made to the union representatives or during disciplinary hearings are protected as a matter of strong federal policy. The remaining alleged conduct is hardly so "outrageous that 'no reasonable man in a civilized society should be expected to endure it.'" (Id. at p. 294.)

In sum, because the investigation giving rise to and forming the basis of the allegedly offensive conduct was required by the collective bargaining agreement, the risk of judicially imposed liability for it cannot be said to be merely "peripheral" to federal labor policy. DeTomaso's exclusive remedy was in the grievance adjustment procedures designated by the collective bargaining

agreement for resolution of disputes stemming from an employee's belief "that he has been unjustly dealt with or that any provision of (the) Agreement has not been properly applied or interpreted." The Court of Appeal erred in concluding otherwise.

As we have noted earlier, the jury's verdict does not reveal whether the tort or warranty theory formed the basis for its imposition of liability on Pan Am, nor how damages were allocated, if at all, between the two theories. Generally, "(w)here there are several counts or causes of action, a general verdict will stand if the evidence supports it on any one sufficient count." (7 Witkin, Cal. Procedure 3d ed. 1985) Trial, § 331, p. 332.) The evidence in this case, however, clearly cannot support the damage award based solely on the breach of warranty cause of action. It is, therefore, necessary to remand the case for retrial on the breach of warranty cause of action. Accordingly, the Court of Appeal's judgment -- setting

aside the trial court's order granting Pan Am a new trial and affirming and reinstating the trial court's judgment -- is reversed. The Court of Appeal is directed to enter a new judgment consistent with the views expressed herein, to determine the right to costs on appeal, and to remand this case to the trial court for a new trial on the breach of warranty cause of action.

PANELLI, J.

WE CONCUR:

LUCAS, C.J.
MOSK, J.
BROUSSARD, J.

APPENDIX B

L.A.
32150

(CT. OF APPEAL NO.
2/3 B00675)

(SUP. CT. NO.
SWC 48784)

IN THE SUPREME COURT

OF THE

L. A. 3 2 1 5 0 STATE OF CALIFORNIA

---

JOHN DE TOMASO,

Plaintiff, Appellant
and Cross-Respondent

vs.

PAN AMERICAN WORLD AIRWAYS, INC.,

Defendant, Respondent

and Cross-Appellant

---

Appeal from the

Superior Court of Los Angeles County

Hon. Stephen R. Stothers, Judge

PETITION FOR REHEARING

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Respondent, John
DeTomaso

TABLE OF CONTENTS


| | PAGE |
|---|---|
| Petition for Rehearing..... | 1 |
| Grounds for Rehearing..... | 1 |
| Argument..... | 3 |
| 1. THE COURT WRONGLY WENT OUTSIDE THE EVIDENCE IN DECIDING THAT THE RAILWAY LABOR ACT (RLA) PREEMPTS DE TOMASO'S STATE COURT REMEDIES BECAUSE THE COLLECTIVE BARGAINING AGREEMENT MANDATED AN INVESTIGATION AS A CONDITION PRECEDENT TO DISCHARGE. NEITHER THE COLLECTIVE BARGAINING AGREEMENT, NOR ANY PART THEREOF, WERE INTRODUCED INTO EVIDENCE.. | 3 |
| 2. A JUDGMENT OF A LOWER COURT IS PRESUMED CORRECT; PAN AM DID NOT RAISE THE ISSUE THAT THE EVIDENCE DID NOT SUPPORT THE VERDICT, AND THUS WAIVED THAT ISSUE; AN APPELLATE COURT CANNOT FIND THAT THE EVIDENCE DID NOT SUPPORT THE VERDICT IN VIEW OF THE PRESUMPTION, THE WAIVER, AND THE PRESENCE OF SUBSTANTIAL EVIDENCE TO SUPPORT SAME..... | 8 |
| 3. THE DECISION DOES NOT PASS ON THE ISSUE RAISED BY DE TOMASO THAT TO DENY HIM ACCESS TO THE TRIAL COURT BY RLA PREEMPTION SERVES TO VIOLATE HIS STATE AND FEDERAL | |

CONSTITUTIONAL RIGHTS
TO TRIAL BY JURY AND
DENY HIM OF PROPERTY
WITHOUT DUE PROCESS OF
LAW..... 23

Conclusion..... 24

## TABLE OF AUTHORITIES CITED


| | PAGE |
|---|---|
| **CASES** | |
| Allis-Chalmers v. Leuck (1985) 471 U.S. 202..... | 5 |
| Andrews v. Louisville & Nashville.. R.R. CO. (1972) 406 U. S. 320 | 4,5,6, 7,25 |
| Buckhantz vs. Hamilton 71 CA 2d 777 | 11 |
| Coleman v. Farwell (1929) 206 C 740 | 8 |
| Crawford v. Southern Pacific R.R. . (1935) 3 C 2d 427 | 9 |
| Dimick v. Schiedt (1935) 293 U.S. . 474 | 23 |
| Elgin, Joliet and Eastern R.R. vs.. Burley (1944) 325 U.S. 711 | 7 |
| Estate of Teel (1944) 25 C 2d 520 . | 11 |
| Fibreboard v. East Bay (1964) ..... 227 CA 2d 675 | 10 |
| Kirchner vs. Atchison, etc. R.R. .. (1948) 32 C 2d 176 | 10 |
| Lady vs. Barrett (1941) 43 CA 2d . 685 | 4 |
| Loving vs. Blick (1949) 33 C 2d ... 603 | 4 |
| Magnuson vs. Burlington Northern .. (9th Cir. 1978) 576 F. 2d 1367 | 4,5,6, 7,24, 25,26 |
| Miller v. United Airlines (1985)... 174 CA 3d 878 | 4,6, 25 |

Ortzman vs. Van der Waal (1952) .... 10
114 CA 2d 167

Powers v. Bd. of Public Works (1932) 10
216 C 546

Railway Labor Executives vs. The.... 7,8
Atchison, Topeka and Santa Fe R.R.
(1970 9th Cir.) 430 F. 2d 944

Raybourn vs. Burlington Northern ... 6
R.R. (W. D. Mo. 1985) 602 F. Supp
385

Shoemaker vs. Goldman (1934) 2 CA... 4
2d 229

Walling vs. Kimball (1941) 17 C 2d.. 8
364

## TABLE OF AUTHORITIES CITED


PAGE

### STATUTES

California Constitution Article I §7 .. 23

California Constitution Article I §13 .. 23

Civil Code §45a..... 12

Civil Code §46 subdivision 1 ..... 12, 26

Civil Code §47 ..... 9

Penal Code §485 ..... 9

45 U.S.C. §151a(5) ..... 7

U. S. Constitution, Amendments 6 and 7 ... 23

U. S. Constitution, Amendment 14 . 24

U. S. Constitution, Article III §2 23

### TEXTS

18 Cal. Law Review 583 ..... 24

31 Cal. Law Review 454 ..... 23

6 Hasting's Law Journal 197 ..... 23

Witkin "California Procedure" 2d Ed. "Appeal" p. 4208-9 4

3 Witkin "Summary of California Law" Constitutional Law §102 24

L.A.
32150

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

---

JOHN DE TOMASO,

Plaintiff, Appellant
and Cross-Respondent

vs.

PAN AMERICAN WORLD AIRWAYS, INC.,

Defendant, Respondent
and Cross-Appellant

---

PETITION FOR REHEARING

---

Plaintiff, appellant and cross-respondent, John DeTomaso, hereby respectfully petitions for a rehearing, and that upon such rehearing, the Decision filed on March 23, 1987 be vacated and withdrawn and a new Decision filed, which includes all of the material facts and decides all of the issues presented in a manner which can be reconciled with the undisputed facts hereinafter set forth and with the state

and federal statutes and cases hereinafter cited.

GROUNDS FOR REHEARING

This PETITION FOR REHEARING is made on the following grounds:

I. The Decision appears to be based on the contents of a Collective Bargaining Agreement, or part thereof, between Pan Am and the Teamsters Union mandating that an employee cannot be discharged or disciplined without investigation and approval of Pan Am. This Court concluded that the investigation was pursuant to said provisions, that any tortious acts that took place during same were "inextricably intertwined with the investigation and discharge procedures mandated by the collective bargaining agreement," and were therefore

preempted by the RLA. THE COURT APPEARS TO HAVE GONE OUTSIDE THE EVIDENCE SINCE NEITHER THE COLLECTIVE BARGAINING AGREEMENT NOR ANY PART THEREOF WERE INTRODUCED INTO EVIDENCE.

2. None of the "issues" raised by Pan Am in its Opening Brief on Review (set forth in pages 4 and 5 thereof) raise the issue that the evidence does not support the jury verdict. That issue was, therefore, waived. Yet, the Decision adopts evidence urged by Pan Am that is inconsistent with the substantial evidence which the jury, of necessity (in following the instructions) found to be true in rendering its verdict in favor of DeTomaso. When there is substantial evidence to

support a jury verdict, an Appellate Court cannot find that the evidence does not support same, a fortiori when the issue has not been raised.

3. The Decision does not pass on the issue raised by DeTomaso that to deny him access to the trial court by RLA preemption serves to violate his State and Federal Constitutional rights to trial by jury and deny him of property without due process of law. "Preemption" presupposes the existence of a valid underlying law. DeTomaso has raised that issue; yet, the Decision fails to deal with it. In the absence of a constituionally valid law, there can be no preemption.

ARGUMENT

1. THE COURT WRONGLY WENT OUTSIDE

THE EVIDENCE IN DECIDING THAT THE RAILWAY LABOR ACT (RLA) PREEMPTS DE TOMASO'S STATE COURT REMEDIES BECAUSE THE COLLECTIVE BARGAINING AGREEMENT MANDATED AN INVESTIGATION AS A CONDITION PRECEDENT TO DISCHARGE. NEITHER THE COLLECTIVE BARGAINING AGREEMENT, NOR ANY PART THEREOF, WERE INTRODUCED INTO EVIDENCE.

The Decision is replete with citations and quotations to a Collective Bargaining Agreement purportedly between Pan Am and the Teamsters Union. Yet, no such document was introduced into evidence, nor even marked for identification, by the Appellant, Pan Am, nor any other party. When matters urged by an appellant (here Pan Am) were not offered in evidence, they cannot be included in the record on appeal and it is improper to set them forth in briefs or oral argument. They are outside the scope of appeal (Lady vs. Barrett (1941) 43 CA 2d 685, 687; Shoemaker vs. Goldman (1934) 2 CA 2d 229; Loving vs. Blick (1949) 33 C 2d 603, 613; Witkin "California Procedure" 2nd Ed., "Appeal" p. 4208-9).

Where, then, did the California

Supreme Court in the instant case find the underlying matter from which it so liberally quoted, to which it referred, and which it used as the basis for its decision that the RLA preempts state court jurisdiction over the facts of the instant case? It can't be from the evidence because neither the collective bargaining agreement nor any part thereof was introduced into evidence. The answer is as follows:

On Page 18 of Pan Am's "OPENING BRIEF ON REVIEW OF PAN AMERICAN WORLD AIRWAYS, INC." (OB 18), Pan Am improperly cites the Court to CT 210 and CT 212. CT 210 and CT 212 are not items in evidence - they are two pages of an unidentified document, lacking foundation, and appended as an exhibit to Pan Am's TRIAL BRIEF filed September 12, 1983 (CT 176 - 215). DeTomaso has been plagued by Pan Am's erroneous citations throughout this appeal.

What is the effect of the use by the Court of this document? In the absence of

a collective barbaining agreement, there is no document which will permit the rules of Andrews vs. Louisville & Nashville R.R. (1972) 406 U. S. 320; Magnuson vs. Burlington Northern (9th Cir. 1978) 576 F. 2d 1367, and Miller vs. United Airlines (1985) 174 CA 3d 878, to be applied.

The Decision of this Court, which is expressly based on t he rules of said cases, must be set aside. Pan Am has not raised the issue of whether the evidence supports the verdict (OB 4-5), but has asserted the jurisdictional defense of preemption (OB 4). The burden of proof is on the party seeking the benefit of the defense of preemption to raise it and prove it.

Pan Am chose not to introduce the collective bargaining agreement into evidence. By so doing, there was no collective bargaining agreement before the Trial Court, nor is one before this Court. This Court cannot apply rules or tests in a vacuum to determine whether the rights

DeTomaso sought to pursue in the State Court were governed by a collective bargaining agreement, which, in turn, may or may not be exclusively arbitratable under the RLA. (Andrews vs. Louisville & Nashville R.R. (1972) 406 U. S. 320, 324). Further, under Magnuson vs. Burlington (9th Cir. 1978) 576 F. 2d 1367, 1369 - 1370, the Court has no agreement to look at in order to determine whether the conduct complained of is "'arguably' governed by the collective bargaining agreement or has a 'not obviously insubstantial' relationship to the labor contract."

The United States Supreme Court's recent decision in Allis-Chalmers vs. Leuck (1985) 471 U. S. 202 also emphasized that if preemption is to apply to suits alleging contract violations under §301 of the LMRA, consideration must be given to the terms of a collective bargaining agreement in order to evaluate to see if the underlying facts of a state court claim are

inextricably intertwined as to dictate preemption (Id. at p. 21).

In the absence of the collective bargaining agreement (as in the instant case), the Court cannot use the Magnuson approach in order to determine if the facts on which the cause of action is premised is either (1) unrelated to matters governed by a collective bargaining agreement, or (2) so far exceed the scope of reasonable conduct that reference to the collective bargaining agreement is unnecessary to resolve the claim.

In Raybourn vs. Burlington Northern R.R. (W. D. Mo. 1985) 602 F. Supp. 385, the Court rejected the employer's RLA preemption argument on the ground that the claim was "legally independent of any contractual claims or grievances he (Raybourn) may have." (602 F. Supp. at p. 387). In the instant case, the Court doesn't even have before it the collective bargaining agreement to examine in order to apply any tests -

Andrews, Magnuson, Miller or Raybourn. The Court cannot speculate what may have been contained therein.

In the instant case, the Decision states at Pages 21 to 22:

> "The facts at the case at bench fall squarely within the ambit of Magnuson. Here, as previously noted, the collective bargaining agreement required that an investigation and hearing take place before an employee could be discharged or disciplined. When Pan Am learned of what appeared to be a theft in which DeTomaso may have been implicated, it conducted the required investigation and held a hearing before determing whether to discharge or discipline him. DeTomaso complains of the statements made during both the investigation at his garage and the subsequent

courtesy calls to Chandiramani, and of Startzell's statement at the January 1979 meeting. However, all these acts were inextricably intertwined with the investigation and discharge procedures mandated by the agreement." (Emphasis added).

Now that we know there is no collective bargaining agreement before this Court, the tests contained in the Andrews and Magnuson cases cannot be applied. These relate to "minor disputes" which the Court has properly observed at Page 11 of its Decision, are "disputes growing out of 'grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." (45 U. S. C. §151a (5)).

Would the result be different if the facts were governed by the "omitted cases" doctrine" An "omitted case" was defined in Railway Labor Executives vs. The Atchison Topeka and Santa Fe R.R. (1970 9th Cir.)

430 F. 2d 944 at 996, the Court said:

> "The jurisdiction of the Adjustment Board is not limited to disputes arising from the provisions specifically included in a collective bargaining agreement. If the claim is founded upon some incident of employment relationship or an asserted one, the Board may determine the meaning and effect of the provisions of the collective bargaining agreement with reference either to an included or to an omitted case." (Emphasis added). Elgin, Joliet and Eastern R.R. vs. Burley (1944) 325 U.S. 711 at 723.

Thus, in the Railway Labor Executives case, the "meaning and effect of the provisions of the collective bargaining agreement" must be determined when questioned, whether the case involves a "minor dispute" or an "omitted case". Again, in the instant case, the Court does not have before it any

collective bargaining agreement.

The Decision of the Court is replete with references to the text of the erroneous collective bargaining agreement, and in some instances quotes from it. Examples are: Page 6, lines 5-7, 16 and 23 and 24; page 13, line 19 to page 14, line 3; page 19, lines 9-20; page 21, line 17 to page 22, line 7; page 22, lines 9-12; page 23, lines 13-16; page 24, lines 5-6; page 25, lines 22-25; page 26, lines 1-23; and page 27, lines 5-8 and lines 14-24. In each of these instances, the Court has, albeit erroneously, believed it had before it a collective bargaining agreement. Since it did not, the basis for the finding of pre-emption must dissolve.

2. A JUDGMENT OF A LOWER COURT IS PRESUMED CORRECT; PAN AM DID NOT RAISE THE ISSUE THAT THE EVIDENCE DID NOT SUPPORT THE VERDICT, AND THUS WAIVED THAT ISSUE; AN APPELLATE COURT CANNOT FIND THAT THE EVIDENCE DID NOT SUPPORT THE VERDICT IN VIEW OF THE PRESUMPTION, THE WAIVER, AND THE PRESENCE OF SUBSTANTIAL EVIDENCE TO SUPPORT SAME.

A judgment of a lower court is presumed correct. All intendments and presumptions are indulged in to support it on matters as to which the record is silent, and error must be affirmatively shown. (Walling vs. Kimball (1947) 17 C 2d 364, 373; Coleman vs. Farwell (1929) 206 C 740).

Applying the above rules, the verdict of the jury in favor of DeTomaso is presumed to be correct and in attacking that verdict, Pan Am had (and has) the affirmative burden of showing error.

An examination of the "issues" raised by Pan Am in its Opening Brief, pages 4 and 5, reveal that issues 1, 2, 3 and 9 are contentions of preemptions under the RLA; issue 4 is Civil Code §47 (privilege during the grievance procedures); issue 5 preemption by the Workers Compensation Act; issue 6 punative damages; issue 7 mutual mistake, and issue 8 theft under Penal Code § 485, i.e., truth as a defense to defamation. PAN AM HAS NOT RAISED THE ISSUE THAT

THE EVIDENCE DOES NOT SUPPORT THE VERDICT. Even if it had raised that issue, where evidence is in conflict, the Appellate Court will not disturb the verdict of the jury. The rule was clearly spelled out by the California Supreme Court in Crawford vs. Southern Pac. R. R. (1935) 3 C2d 427 at 429:

> "In reviewing the evidence on such an appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or

more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (Emphasis added.)

The conflicting evidence rule does not permit weighing of the evidence or reversal of a judgment in accordance with the preponderance thereof. Even a judgment against the weight of the evidence must be affirmed, provided the record is free from prejudicial error, if there is substantial evidence to support it. Examples of "substantial evidence" sufficient to uphold a jury verdict are:

(a) The testimony of a single witness, even the party himself, as against several, (Kircher vs. Atchison etc., R. R. (1948) 32 C 2d 176, 178);

(b) The testimony of one or more lay witnesses against that of an expert (Ortzman vs. Van der Waal (1952) 114 CA 2d 167, 170;

(c) Incompetent or otherwise inadmissable evidence admitted without objection (Powers vs. Bd. of Public Works (1932) 216 C 546, 552);

(d) Inferences from circumstantial evidence as against direct evidence (Fibreboard vs. East Bay (1964) 227 CA 2d 675, 697);

The test, however, is not whether there is substantial conflict, but rather whether there is substantial evidence in favor of the respondent. If this "substantial" evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment shall be affirmed. In brief, the appellate court ordinarily looks at the evidence supporting the successful party (herein De Tomaso), and disregards the contrary showing (Estate of Teel (1944) 25 C 2d 520, 527; Buckhantz vs. Hamilton (1945) 71 CA 2d 777, 780.)

The above rules are important in

the instant case because this Court appears to have overlooked the volume of evidence which supports the jury verdict in favor of DeTomaso. For instance, in footnote 13 on page 24 of the Decision, the Court states:

> "The New York Times standard applies to assure that the robust speech often occurring in the labor context does not become the basis for judicially imposed liability. The jury in the instant case was not so instructed. We note in passing that the facts alleged here cannot possibly meet that standard. For example, having just discovered the missing batteries in DeTomaso's garage, it is inconceivable that Startzell's accusation was made with knowledge of its falsity or reckless disregard as to whether it was true or false."
>
> (Emphasis added).

First, if it is the position of this

Court that accusing a person of stealing is nothing more than "robust speech" which one must tolerate, then such is at odds with the law of California as reflected in B.A.J.I. 7.09 (1982 NEW). B.A.J.I. 7.09 was given to the jury (CT 322). It advises the jury that the Trial Court has determined as a matter of law that the statement that De Tomaso was a thief or that he was dishonest with Pan Am was slanderous per se, and then charges the jury with the duty of determining if the additional facts were present that are conditions precedent to liability. The position of the Court is also in conflict with Civil Code §46 subdivision 1 which provides that slander is a false and unprivileged publication, orally made, that charges any person with a crime. Civil Code §45a defines defamation per se as a defamation of the plaintiff without the necessity of explanatory matter.

Second, B.A.J.I. 7.06 (1982 NEW) was given to the jury (CT 320). It defines

ACTUAL MALICE. In addition, B.A.J.I. 7.12 (1982 NEW), requiring actual malice as a condition precedent to punative damages, was given (CT 325). All of the foregoing instructions were, and are, approved B.A. J.I. instructions, and were but part of the defamation instructions given. (See also B.A.J.I. 7.00 (CT 317), 7.01 (CT 318), 7.02 (CT 319), C.C. §47(3) (CT 321), and 7.10 (CT 323 - 324), all of which are 1982 NEW and were given.)

Third, Pan Am's Director of Security, Mr. Startzell, did not "just discover the missing batteries in DeTomaso's garage.'" This is a false statement or characterization of the evidence. Startzell was advised about the Texas Instrument batteries while at the Pan Am warehouse at LAX BEFORE he, F. B. I. agent O'Neill and DeTomaso went to DeTomaso's garage (RT 414, lines 5-7, 14-28). At the warehouse, DeTomaso told Startzell and O'Neill that the items were in his garage at home. DeTomaso testified

that he told them, "I told them (Startzell and O'Neill) that I bought the stuff from Don Roark (Pan Am Cargo Supervisor), the stuff was in my garage, the things that were abandoned that Pan Am sold me." (RT 62, lines 10-12).

Next, after DeTomaso told Startzell and O'Neill he had bought the items from Pan Am (through Cargo Supervisor Don Roark), Startzell and O'Neill went to Don Roark and verified that DeTomaso had, in fact, purchased the items from Pan Am. (RT 62, lines 14-16; RT 340, lines 18-22; RT 415, lines 11-17). When Startzell and O'Neill returned from their meeting with Don Roark, DeTomaso did not offer to take them to his garage and show them the items (as was stated in the Decision, page 4, lines 19-20), but was asked by them if they could go to his home. De Tomaso testified:

> "A. After they talked to me, they went and talked to Don Roark and they decided to go to my house

and they came to the warehouse - - -"

"Q. Now, did they come back to the warehouse and talk to you again?

"A. They did."

"Q. And what was that conversation the second time?'

"A. They asked if they could go to my house." (RT 62, lines 14-21).

It was AFTER Startzell and O'Neill had verified that DeTomaso had purchased the items from Pan Am and had not stolen them, that the three went to DeTomaso's garage. Up to the time O'Neill and Startzell concluded that a theft had not occurred, it was primarily an F. B. I. investigation. When O'Neill and Startzell went to DeTomaso's garage, it was a RECOVERY OPERATION. Pan Am wanted to recover the batteries and O'Neill, illegally under color of authority, used his F. B. I. job to help his friend, Startzell, do so. Agent O'Neill testified:

"Q. You just testified, if I remember correctly, that you

knew his employer (Pan Am) said that he (Mr. Roark) sold it to John (DeTomaso); John had purchased it from him. You knew all that. What did you have in your mind. What evidence did you have that indicated that that property had been stolen?

"A. At that time, I had no evidence that it was actually stolen.

"Q. Then what authority did you operate under to confiscate that property?

"A. Only that it did not belong to him." (RT 422, lines 10-16).

Agent O'Neill also testified in connection with questions put to him by Mr. Cleaves:

"Q. O.K. Now, when you confiscated the property that Mr. DeTomaso had in his possession, were you not informed by Mr. DeTomaso and his employer (Pan Am) that Mr. DeTomaso had purchased that property from Pan Am as abandoned cargo?

"A. Yes." (RT 421, lines 23 - 27).

Agent O'Neill also testified that he did not book the property as normally would have been done had it been stolen (RT 424, line 24 - 425, line 4); that he waited a day and turned it over to Continental

Airlines (RT 425, lines 5-10). Then, Agent O'Neill testified that:

> "Q. Isn't it a fact, sir, that you were assisting your friend, Mr. Startzell, in his capacity as a security agent for Pan Am to assist Pan Am to recover that property?
>
> "A. Oh, that was part of it. That's correct." (RT 423, lines 13-16).

All of the foregoing, in spite of his admission that the F. B. I. enforces only criminal laws and not civil, and does not act as a collection agent for Pan Am (RT 422, lines 26-28 ; RT 423, lines 7-12).

It was during this recovery operation that Startzell used O'Neill to frighten DeTomaso through the unlawful use of F. B. I. authority, and through the accusation of theft. Present in the garage with De Tomaso, Startzell and O'Neill was DeTomaso's young som, Sean, age 10. In the presence of Sean, Startzell clearly and unambiguously accused DeTomaso of stealing the items he had, in fact, purchased from Pan Am. Sean testified:

"Q. Did you hear Mr. Startzell make any accusations to your father about how your father got that property?

"A. Yes.

"Q. What did Mr. Startzell say to your father?

"A. He accused him of stealing.

"Q. And as a result of your hearing that allegation made by Mr. Startzell to your father, did you ask your father in the presence of these gentlemen any questions?

"A. Yes.

"Q. What did you ask your father?

"A. I asked him if he was going to be arrested.

"Q. And as a result of your inquiry to your father about that, did your father in your presence ask these gentlemen anything?

"A. Yes.

"Q. What did he ask these people?

"A. He asked them if he was going to be arrested.

"Q. And did either one of these men, and if you can tell me which one, reply to that question?

"A. The F.B.I. replied that if Pan Am found him guilty, he would be arrested." (RT 321, line 11-322, line 3).

DeTomaso did not solicit the accusation from Startzell. DeTomaso testified:

"Q. Did any part of the conversation prior to that discussion involve any accusations made by Mr. Startzell concerning whether or not you had stolen the merchandise?

"A. It did -- he did.

"Q. What did Mr. Startzell tell you in the presence of your son concerning that?

"A. He said that it appeared I had stolen merchandise, that the stuff looked very suspicious; that since there were air waybills on it marked very clearly, that I had probably taken the stuff.

"Q. Was that when your son asked you if you were going to be arrested?

"A. That's correct." (RT 64, lines 4-16).

Thereupon agent, O'Neill, over the objections of DeTomaso, confiscated the batteries, and, on the insistence of De Tomaso, gave him a receipt (RT 65, line 6 - 66, line 2; Plf. Ex. 9, CT 544).

As it turned out, Mr. Startzell had been an F. B. I. agent for thirty years and was a friend of agent O'Neill about six

years professionally (RT 373, line 28 - 374, line 2; RT 423, lines 13-16).

In the Decision at Page 5, the Court states:

> "Startzell said something to DeTomaso that Sean interpreted as an accusation of theft.[5/]"

In footnote 5, the Court states:

> "5/ It is unclear exactly what statement Sean interpreted as an accusation...DeTomaso testified that Startzell stated that it appeared that he had stolen the batteries and that, since there were waybill numbers on the cartons, he had probably taken them. Sean testified simply that Startzell had 'accused his father of stealing'".

The Court appears to characterize the testimony of Sean as "unclear", but it is submitted, Sean testified very clearly - "He (Startzell)accused him (DeTomaso) of stealing." (RT 321, line 11 - 322, line

3). The jury found no difficulty with the testimony, and, following the detailed California approved B.A.J.I. jury instructions, rendered a verdict against Pan Am. That verdict was based on much more than "substantial evidence", as that term is defined above, and therefore should be supported by this Court.

The Decision also contains many other misstatements of fact. At Page 5, lines 11-12, it is stated that DeTomaso was "... hospitalized for the removal of his appendix and of a growth on his intestine." Neither Pan Am nor DeTomaso so contend. Pan Am, at Page 11 of its Opening Brief, under Paragraph K, states correctly that:

> "In November, 1978, subsequent to the October 1978 trip to his garage with Startzell and F. B. I. agent O'Neill, but prior to his termination in January, 1979, De Tomaso developed a continuous pain in his upper right side below the rib

cage (RT 84). After being examined by three doctors, who could not determine what was wrong with him, DeTomaso underwent exploratory surgery by Dr. Peters (RT 85). Dr. Peters removed an acute supperative appendix (RT 85; 235) and a Meckel's diverticulum (RT 85; 238). Following the surgery, DeTomaso went back to Dr. Peters claiming the pain had returned (RT 86)."

DeTomaso concurs with Pan Am's characterization of the evidence and emphasizes that DeTomaso, right after Pan Am's illegal recovery operation, began to experience several abdominal pains, for which he underwent major abdominal surgery which, in turn, did not cure the pains. This was not hospitalization for an appendectomy. It is also not the type of thing a person would undergo just to build up medical specials.

Other examples of inaccurate characterizations and facts contained in the

Decision are as follows:

A. On Page 3, the Court states that Pan Am employee, Mr. Lasso, "prepared an inventory of shipments that had been in the warehouse for an unusually long time. Lasso placed the inventoried shipments in bins on the upper level of a cargo rack near the salvage bins, with a sign stating "All transfers. Do not touch.'....One of the inventory items found in DeTomaso's bins was a shipment of 13,000 Sylva cell batteries." (Emphasis added).

While the above is correct as far as it goes, it suggests DeTomaso removed the 13,000 batteries from the Lasso bins and included the batteries, along with some other items he purchased, I. E., he stole the batteries. In fact, all of the property DeTomaso bought from Pan Am on September 19, 1978 was on the Lasso inventory and came from the same bins offered for sale by

Mr. Roark to another Pan Am employee, Mr. Gerald Lorek, prior to selling the items to DeTomaso (RT 355, line 1 - 356, line 13; Def. Ex. A, CT 597 - 600; RT 480, line 10 - 481, line 19).

B. On Page 4, line 23 - 5, line 1, the Court characterizes seven boxes containing the batteries to be "part of recent shipments". In fact, the batteries were received by Pan Am on June 30, 1978 and sold to DeTomaso as abandoned property on September 19, 1978; the Ryan Instruments were received by Pan Am on November 29, 1977 until sold to DeTomaso on September 19, 1978, and the Texas Instruments "Photomasks" were received by Pan Am on June 19, 1978, until sold to DeTomaso on September 19, 1978. These can hardly be characterized as "recent shipments" in an industry that carries goods around the world in less than one week. (Plf. Ex. 29, CT 591 - 592; Plf. Ex. 15, CT 554 - 557; Plf. Ex. 6, CT 539 - 540).

C. On Page 6, line 17, the Court refers to a further investigation into the "October" salvage purchases. There were none in October. The sales took place on September 15 and 19, 1978.

D. On Page 7, lines 11-14, the Court says Startzell "stated that DeTomaso was being discharged because of his involvement in the theft of the batteries." This characerization tones down what Startzell said. Chandiramani testified Startzell said that "John was being terminated for stealing." (RT 111, line 8).

E. The Court appears to minimize the suffering DeTomaso experienced as a result of the conduct of Pan Am. Only on Page 5 is anything mentioned about De Tomaso's damages. There it is stated that "Sean and DeTomaso's wife, Carla, testified that after the investigation, the family relationship deteriorated." And, in the next paragraph, it is mentioned, albeit erroneously, that DeTomaso was "hospitalized

for the removal of his appendix and of a growth on his intestines." The following constitutes a more accurate summary of his damages:

(1) The heartache and emotional distress resulting from the false allegation of theft made against him by Pan Am, followed by his being fired on the erroneous charges;

(2) The humiliation of being accused of theft in front of his young son, Sean, and being told he may be arrested;

(3) The humiliation and ebarrassment of having to work with fellow employees who heard about the charges and believed them to be true, who shunned him and made jokes about him (RT 478, line 2 - 479, line 23; RT 498, line 22 - 499, line 22; RT 501, line 20 - 502, line 22, RT 128, lines 11-13);

(4) The social life he had enjoyed with other employees was cut off by them because he was accused of the theft and

fired (RT 479, line 24 - 480, line 4; RT 503, lines 14-24);

(5) Fellow employees shunned him and talked about him behind his back even after he was reinstated (RT 503, lines 2-5; RT 128, lines 24 - 129, line 5), and such conduct by fellow employees followed him even after he transferred out of the cargo department in an attempt to get away from the adverse environment (RT 129, line 6 - 135, line 7);

(6) Months before he was fired, and as a result of the stress imposed on him by the conduct of Pan Am, he experienced severe abdominal pains in the upper right quadrant, and was admitted to the hospital. An exploratory laparotomy was performed on November 15, 1978. The incision was vertical and in the center of the abdomen. While inside, Dr. Peter removed the appendix which was inflamed, and a growth (Michel's diverticulum) on the intestine, neither of which caused the pain nor cured it as a result

of their removal. The pain continued to recur after surgery, and DeTomaso returned to Dr. Peter in early December, 1978. He was referred to Dr. Ryan for tests, but no physical cause for the pain was found (RT 84, line 8 - 87, line 8).

From February 26, 1980 to July 2nd, 1980, DeTomaso sought and received psychiatric help from Dr. L. Ciaramelli, a medical doctor for forty-one years. For the first ten years, she was an internist, and then specialized in psychiatry since 1956. She was a psychiatrist for the United States Government in Lexington, Kentucky and Brentowod, California from 1961 to 1966, and then became Chief of In-Patient Psychiatric Services at Olive View Hospital for Los Angeles County.

After evaluating DeTomaso, she treated him with medication which reduced his stress, but did not cure it, and attributed his emotional disturbance to the stress resulting from the conduct of Pan

Am. The emotional stress could, she testified, trigger the change in body chemistry so as to result in an inflamed appendix, although she doubted that the pain could be attributed to that condition since the pain persisted subsequent to the surgery (RT 240, lines 13-21). In addition, an exploratory laparotomy is not a procedure used in performing an appendectomy. It is an exploratory incision into the abdominal cavity so that both the upper and lower portions of the abdomen can be examined (RT 224, lines 18-26; RT 229, lines 5-18). At the time of the trial, nearly five years after the initial trauma was experienced, DeTomaso was still depressed, which condition was not consistent with the type of stress a person would experience simply by testifying (RT 234, line 22 - 235, line 5).

(7) DeTomaso suffered a breakdown with his family, took his stress out on his wife and children, lost the bulk of his sexual relations, saw his family suffer

greatly, and lost his church relationship as well as his social contacts (RT 141, line 21 - 143, line 15; RT 322, line 4 - 323, line 16; RT 325, line 3 - 328, line 2). The problem has even followed the family when on vacation. When checking in with the Pan Am agent in Hawaii, the agent took DeTomaso's name, and then said to him in the presence of his wife, "I know you. We've already heard about you." (RT 327, line 25 - 328, line 2).

The distress experienced by De Tomaso resulting from the conduct of Pan Am was emphasized by him in a letter he authored to Pan Am dated September 22, 1982, during a time when he had been granted leave based on Industrial Injury for mental distress resulting from the conduct of Pan Am. In his letter to Pan Am, he begged for an earlier appointment with the company psychologist "...because I am suffering from emotional distress and depression caused by the conduct of the company through certain of its employees, and I need help

right away." (Plf. Ex. 24, CT 573). Pan Am rejected the plea (RT 135, line 8 - 136, line 3).

(8) DeTomaso sustained the following special damages:

(a) The fair market value of 13,000 GP57 batteries that were confiscated at $4.75 each, $61,750 (RT 141, lines 1-15);

(b) Hospital and medical bills for the surgery, $7,503.45 (RT 87, lines 9-26);

(c) Medical bill of Dr. Ciaramelli, $354.00 (RT 89, lines 20-22);

(d) Total of (a) - (c) above - $69,607.45.

No meidcal testimony was offered by the defense, nor were there any witnesses offered to controvert the fair market value of the batteries. Further, Pan Am at no time gave notice of rescission, nor did it offer to restore the consideration paid to it by DeTomaso (RT 140, lines 9-12).

3. THE DECISION DOES NOT PASS

ON THE ISSUE RAISED BY DE TOMASO THAT TO DENY HIM ACCESS TO THE TRIAL COURT BY RLA PREEMPTION SERVES TO VIOLATE HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO TRIAL BY JURY AND DENY HIM OF PROPERTY WITHOUT DUE PROCESS OF LAW.

"Preemption" presupposes the existence of a valid underlying law. DeTomaso has raised that issue, yet the Decision fails to deal with it. In the absence of a constitutionally valid law, there can be no preemption.

The Federal Constitution provides that civil suits at common law where the amount in controversy exceeds $20.00 must be tried by jury. (U.S. Const., Art. III §2; U.S. Const., Amendments 6 and 7: See Dimick v. Schiedt (1935) 293 U. S. 474; 31 Cal. Law Review 454; 6 Hastings Law Hournal 197; 73 Harv. L.Rev. 1861). Similarly, the California Constitution guarantees trial by jury in civil cases but that a jury may be waived. (Cal. Const. Art. I, §7). DeTomaso did not waive his right to

trial by jury, and California has not abolished the right to jury in civil cases. In both California and the Federal Courts, the right to a jury trial depends on whether a jury was allowed at common law. In both cases of defamation and intentional infliction of emotional distress, neither the Federal Courts nor the Courts of California have ever denied a trial by jury to a party who has requested same.

As with trial by jury, both the Federal Constitution (U.S. Const., 14th Amendment) and the California Constitution (Cal.Const. Art. I, §13) provide that no one shallbe deprived of life, liberty, or property, without due process of law. This right guarantees that one will not be denied of property or personal rights by the judiciary or legislature, nor from arbitrary and unreasonable legislation. (See 13 Cal. L. Rev. 583; 3 Witkin "Summary of California Law", Constitutional Law, §102, et seq).

DeTomaso contends that should the Court construe the RLA as abolishing the right of access to the Trial Courts of California for a redress of grievances as set forth in the Complaint in the instant case, such construction would violate the due process clause referred to above. However, DeTomaso does not contend that the RLA preempts his right of access to this Court to have his matter tried there.

The question of trial by jury and of due process have not been passed on as far as DeTomaso is aware. In Magnuson vs. Burlington (9th Cir. 1978) 576 F. 2d 1367, the Court stated at Page 1370;

> "We decline to address any constitutional issue because it was neither raised nor decided below."

## CONCLUSION

The Decision concludes that DeTomaso's state court remedies for defamation and intentional infliction of emotional distress are preempted under the RLA

because the facts that serve as a basis for the claims purportedly occurred during an investigation "mandated" by a collective bargaining agreement and as such (regardless of the merits) are inextricably intertwined therewith.

That conclusion was based on an exhibit to Pan Am's Trial Brief which exhibit was improperly cited by Pan Am in its Opening Brief before this Court. The Trial Brief exhibit is not identified, was never marked for identification, and is not evidence in this case.

This Court does not have before it any collective bargaining agreement.

The tests the Court has applied, as set forth in Andrews, Magnuson and Miller, do not apply because in each of those cases the facts turned on an interpretation and application of the terms contained in collective bargaining agreements authorized, but not mandated, by the RLA. The RLA itself provides no tests, no mandates, no

requirements for investigations, discharges or discipline of airline or railroad employees.

Since preemption is a defense and must be proved by the party seeking its benefits, it was the burden of Pan Am to place into evidence any collective bargaining agreement it felt relevant and which it believed contained terms that might benefit it. It did not do so.

DeTomaso has pled and proved statutory and common law causes of action for defamation and intentional infliction of emotional distress, and for breach of implied warranty of title. Nothing before this Court shows that the facts underlying the tort causes of action were carried out under an investigation mandated by a collective bargaining agreement or under any provision of the RLA.

In the absence of such controlling documentation, this Court is faced with a judgment rendered properly under the

evidence and based on the causes of action pleaded. Pan Am has not raised any issue as to the sufficiency of the evidence to support the jury verdict and has rested its case on the flawed defense of preemption.

If, arguendo, the Court had before it an applicable collective bargaining agreement so that the Magnuson, etc. tests could be indulged in, the tortious conduct in the instant case did not take place during an investigation by Pan Am to determine if an employee stole property. It took place after that question had been resolved in favor of DeTomaso and during an illegal recovery operation to gain possession of only part of the property allegedly stolen. If Pan Am had really believed De Tomaso stole the property from the Lasso inventoried bins, why didn't Startzell take possession of all of the property in De Tomaso's garage - he knew what it was, yet only took the batteries. How far will the courts go to protect airlines and rail-

roads from liability to innocent victims of their torts under the guise of preemption under the RLA. This Court stated, at Page 25 of its Decision that had Pan Am accused DeTomaso "of murder rather than theft", the "situation would, of course, be different." DeTomaso can find no rule of law in defamation cases that purports to grade the crimes a person can accuse another of with immunity. This Court has apparently not considered the express language of Civil Code §46 subdivision 1. Fortunately, however, the Court has acknowledged that "California has an interest in punishing defamatory statements and intentional infliction of emotional distress, as it has in proscribing all tortious conduct." (Decision, Page 27, lines 1 - 3).

Lastly, both the U.S. Constitution and the California Constitution guarantee trial by jury in cases such as this one. To the extent the RLA attempts to preclude

these constitutional guarantees, it is invalid and cannot be used to preempt such actions. Thus, this Court should first pass on the Constitutional issues before it. If the Court rules that the RLA can preempt Constitutional guarantees, then the Court should hold that in the case at bar, there being no collective bargaining agreement before it, there is no RLA preemption. Lastly, if the Court does not consider the absence of a collective bargaining agreement as germaine, then it should nevertheless find that the tortious conduct of Pan Am occurred not during a mandated investigation, but during an illegal recovery operation not cloaked with RLA protection. After all, not even Texas Instruments, the true owner of the batteries, could have used self-help to regain possession of its property without the consent of DeTomaso. That's why we, in California, have courts to resort to.

DeTomaso respectfully requests that

the Court grant DeTomaso's Petition for Rehearing and that the Decision filed March 23, 1987 be vacated and a new Decision be filed in keeping with the material facts for the reasons set forth herein.

MARCH 30, 1987 Respectfully submitted,

ROBERT N. CLEAVES
Attorney for John DeTomaso

APPENDIX C

Order Due

April 22, 1987

ORDER DENYING REHEARING

L.A. No. 32150

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

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DeTOMASO, Appellant

v.

PAN AMERICAN WORLD AIRWAYS, INC.
Respondent

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Appellant's petition for rehearing DENIED.

/s/ Lucas
Chief Justice